Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

PADAM KUMAR KHANNA,

Petitioner,

v.

STATE BAR OF CALIFORNIA; PAT McELROY, Judge of the State Bar of California; TAMMY ALBERTSEN-MURRAY, Deputy Trial Counsel, Office of the Chief Trial Counsel, The State Bar of California; ALICE VERSTEGEN, Investigator of the State Bar of California,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In a California State Bar Proceedings, an *en banc* panel of Ninth Circuit Court has invalidated admission of Indian Court documents which satisfy Hague Legalization of Foreign Documents Convention Treaty – a decision that could affect hundreds of thousands of Indian immigrants to the U.S. with similar documents.

I. Whether foreign documents, authenticated, attested and notarized by the American Embassy which satisfy Hague Legalization of Foreign Documents Convention Treaty are admissible in United States Federal Courts.

II. Whether the Doctrine of Collateral Estoppel applies to the evidence which was before a foreign court who delivered the decision two years after the State Bar Court trial.

III. Whether a State Bar Court judge is entitled to judicial immunity from § 1983 money damage suit when she suspends Petitioner's license to practice law within three days after her decision by invoking California Business and Professions Code § 6007(c)(4) when such act does not fall under her jurisdiction.

QUESTIONS PRESENTED – Continued

IV. Whether the Doctrine of *Stare Decisis* applies where Ninth Circuit Court of Appeals decision, *Hirsh v. Justices of the Supreme Court*, 67 F.3d 708 (1995) overrules the unanimous United States Supreme Court decision *Keller v. State Bar of California*, 496 U.S. 1 (1990). The Supreme Court declares State Bar of California as a nongovernment agency, akin to a union-shop agency, but the Ninth Circuit declares State Bar of California as a government agency entitled to Eleventh Amendment sovereign immunity.

V. Whether the State Bar waived its immunity by having its investigator testify at the trial and fail to provide Petitioner with State Bar office mail room records and fax reception records.

LIST OF PARTIES

PADAM KUMAR KHANNA, is an individual and the Petitioner and the STATE BAR OF CALIFORNIA; PAT MCELROY, Judge of the State Bar of California; TAMMY ALBERTSEN-MURRAY, Deputy Trial Counsel, Office of the Chief Trial Counsel, The State Bar of California; ALICE VERSTEGEN, Investigator of the State Bar of California, are the Respondents.

The Ninth Circuit has erroneously added the names of JAGJIT SINGH RANDHAWA and BALJIT RANDHAWA as Defendants-Appellees in its MANDATE. Both Randhawas were severed from this lawsuit by Magistrate Judge Chen on August 7, 2007. This error was pointed out to the Ninth Circuit but has not been corrected.

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Padam Kumar Khanna respectfully petitions this Court to issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review its judgment below.

OPINIONS BELOW

The judgment of the Court of Appeals is reported as App. 1-3 and the Order for denial of rehearing is attached as App. 82. The Mandate of the Court of Appeals is attached as App. 4-5. The decision of the United States District Court for the Northern District of California is attached as App. 6-39. The decision of the judge of the Hearing Department is attached as App. 40-81. The decision of the Indian Court is attached as App. 87-98.

JURISDICTION

The denial of rehearing by the United States Court of Appeals for the Ninth Circuit was entered on March 18, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

42 U.S.C. § 1983; The Fifth Amendment; The Sixth Amendment; The Due Process Clause and the Equal

Protection Clause of the Fourteenth Amendment; 42 U.S.C. § 1985(2) (conspiracy) and 18 U.S.C. § 1621 (perjury) are attached as App. 83-86.

STATEMENT OF CASE

A. Background:

On November 19, 2001, Jagjit Singh Randhawa and his wife Baljit Randhawa (Randhawas) filed a complaint with the State Bar of California against Petitioner for luring them to invest $25,000 in a fake and sham corporation in India, Amerindia Foods Limited (AFL). The complaint was reviewed and investigated by State Bar investigator, Alice Verstegen (Verstegen) and Deputy Trial Counsel, Tammy Albertsen-Murray (Murray).[1] This investigation took the State Bar nineteen months, and on June 25, 2003, Murray filed a Notice of Disciplinary Charges (NDC) against Petitioner for violating Rules of Professional Conduct, Rule 3-300; Rule 3-700(D)(1); Rule 4-100(B)(3); California Business and Professions Code, §§ 6106. App. 57-67.

[1] During the trial Randhawas testified that even though they had filed the complaint under the penalty of perjury, the first four allegations in the complaint were false, which the trial attorney (Murray) knew, but, oddly, she did not file an amendment after the Notice of Disciplinary Charges (NDC) was filed. See Complaint dated November 19, 2001, State Bar Court Trial Records.

Trial was held in the State Bar Court on August 17-19, 2004. The State Bar trial proceedings are recorded on digital recording machines, and no court reporters are present. After three days of trial, Petitioner was given the digital discs on which one hour forty minutes of cross-examination of main witness Jagjit Randhawa was either erased or damaged and therefore indiscernible. Petitioner demanded a new trial which was denied. A year later Petitioner was ordered to cross-examination Jagjit Randhawa for two hours to compensate for the missing examination transcript. This proved to be a futile effort as Randhawa did not remember the facts.

On October 21, 2004, State Bar Court Judge McElroy (McElroy) issued a decision wherein she suspended Petitioner's license to practice law effective three days from the date of her decision without an order from the State Supreme Court. On October 24, 2004, Petitioner was placed on an involuntary inactive list and barred from the practice of law. Petitioner filed a petition with the Supreme Court of California for review of Judge McElroy's decision. The State Supreme Court summarily denied Petitioner's review. No hearings, no oral arguments or written opinion was issued by the State Supreme Court. Petitioner was disbarred as of June 21, 2006.

B. Proceedings Below:

On May 16, 2007, Petitioner initiated a 42 U.S.C. § 1983 lawsuit for money damages in the District

Court, Northern District of California against the State Bar, State Bar Court Hearing Department Judge Pat McElroy (judge), Deputy Trial Counsel of State Bar, Ms. Tammy Albertsen-Murray (Murray) and State Bar investigator, Ms. Alice Verstegen (Verstegen). Petitioner filed this suit after learning that Amerindia Foods Limited, (AFL), a duly incorporated company in India, had filed a lawsuit[2] in

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[2] In the disciplinary proceedings in the State Bar trial of Petitioner, Judge McElroy accused Petitioner of luring Randhawas to invest $31,000 in AFL in India, a company which according to Judge McElroy never existed. The decision also stated that money deposited in Petitioner's account was never remitted to the Indian company on behalf of Randhawas because it was non-existent and that there was no stock certificate issued to Randhawas. The judge ruled that three AFL letters, written by AFL, were in fact written by Petitioner to misguide the State Bar Court. AFL was neither summoned nor made to testify the genuineness of the letters. Judge's decision was controlling. These letters were introduced despite all the Hearsay, Best Evidence Rules, as there are no civil or criminal evidence safeguards in a State Bar Court trial. A letter to investigator Verstegen, written by the Chairman of AFL, India, was airmailed via DHL to Verstegen's State Bar offices in Los Angeles. The letter confirmed that the money was duly received and credited to Randhawas' account and that Randhawas had been in contact with AFL officers. The investigator testified at the trial that the letter mysteriously appeared at her desk in an envelope which did not have any stamps and there was no DHL cover letter. Trial Transcript (T.T.) page II:53-54. The judge ruled: "Absent any evidence of tampering, the Court believes that Respondent somehow had the letter delivered to the State Bar and not necessarily from India." App. 56. (This baseless and thoughtless speculative accusation of criminal trespass by a person of robe demeans and degrades the sanctity and dignity the bench of justice commands.) As this was the last day of the

(Continued on following page)

India against two of its shareholders, Jagjit Singh Randhawa and his wife Baljit Randhawa (Randhawas), for fraud and deceit, malicious prosecution, conspiracy and perjury.

The suit before the District Court charged that State Bar through its employees, Judge McElroy, Murray and Verstegen, violated Petitioner's constitutional rights by conspiring to cause irreparable personal, physical, financial and emotional harm under color of law. Judge McElroy, Murray and Verstegen were charged in their official as well as individual capacities.

The suit was based upon violations of Fifth Amendment (right to a fair trial), Sixth Amendment (right to Counsel), Fourteenth Amendment (Due Process and Equal Protection), violation of 42 U.S.C. § 1985(2) (conspiracy to interfere with civil rights), and violation of 18 U.S.C. § 1621 (perjury).

The District Court Magistrate Judge granted defendants' Motion to Dismiss. The judge ruled that 1) State Bar of California was an "arm of the state"

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trial, Petitioner immediately contacted AFL which dispatched an Airway Bill indicating that the unstamped envelope was placed in a DHL cover latter and the Airway Bill was signed by someone at Verstegen's office. The Airway Bill was attached as Petitioner's Exhibit FFF along with his Closing Arguments but was rejected and not admitted by the judge who ruled that "Respondent's exhibit FFF attached to his Closing Arguments is not admitted into evidence as it was introduced after trial." App. 72, Footnote 31.

and therefore entitled to Eleventh Amendment sovereign immunity, 2) State Bar employees, McElroy, Murray and Verstegen were entitled to Eleventh Amendment sovereign immunity in their official capacity and 3) Judge McElroy was entitled to judicial or quasi-judicial immunity in her individual capacity as well. However, Magistrate Judge ruled that Murray and Verstegen were not entitled to judicial or quasi-judicial immunity with respect to the claims asserted against them in their individual capacities for acts committed in their investigative functions. App. 29-30. As to the charges against Murray and Verstegen, Magistrate Judge Edward Chen ruled that these charges were barred by collateral estoppel (issue preclusion) because these charges of perjury and conspiracy were "necessarily decided"[3] by the Supreme Court of California when Petitioner sought the review that was summarily denied.

Petitioner filed a timely appeal with the Ninth Circuit Court of Appeal after the District Court judgment. On January 14, 2009, Ninth Circuit *en banc* panel of three judges issued a three page memorandum in which the Court affirmed Magistrate Judge's decision and declared that the State Bar of California

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[3] Petitioner is unclear about this term of "necessarily decided." Petitioner did plead charges of perjury committed by Randhawas AFTER the trial. Petitioner was summarily denied review by the State Supreme Court which apparently overlooked the perjury charges. However no conspiracy charges were alleged. How can Supreme Court of California "necessarily decide" conspiracy cause of action when it was not even pled?

was an arm of the state and therefore all its employees were immune from money damage suits because of the Eleventh Amendment. Judge McElroy was also immune from lawsuit as she had judicial immunity. Charges against Murray and Verstegen were collaterally estopped because the case was "necessarily decided" by the Supreme Court of California. Verstegen was entitled to common law immunity as a witness for her perjury charges. App. 2-3.

On January 24, 2009, Petitioner filed a Motion for Rehearing before a full Court. This motion was also denied on March 18, 2009. App. 82

REASONS FOR GRANTING THE PETITION

I. IF THIS CERTIORARI IS DENIED, THE SUPREME COURT WOULD BE SAYING THAT INDIAN DOCUMENTS AUTHENTICATED, ATTESTED AND NOTARIZED BY THE AMERICAN EMBASSY UNDER THE HAGUE LEGALIZATION OF FOREIGN DOCUMENTS CONVENTION TREATY, WOULD BE INVALID, A DECISION WHICH WOULD SERIOUSLY SUBJECT HUNDREDS OF THOUSANDS OF INDIAN IMMIGRANTS IN THE UNITED STATES TO LAWSUITS.

The integrity of Due Process and Equal Protection for all United States citizens is at stake here. Petitioner has been deprived of his right to life, liberty and property and the right to make a living.

Petitioner's constitutional rights are being violated by tainted perjurious testimonies of complainants and State Bar investigator and the manufacturing, destroying and spoliating evidence. Fifty-three years ago, our Supreme Court stated in *Mesarosh v. United States*, 352 U.S. 1, 9 (1956) that "The dignity of the United States Government will not permit the conviction of any person on tainted testimony. This conviction is tainted, and there can be no other just result than to accord petitioners a new trial." *Id.* at 9.

The records show that Murray and Verstegen spent over 19 months investigating the complaint filed by Randhawas – more than ample time to contact Amerindia Foods Limited in India – before the Notice of Disciplinary Charges (NDC) was issued.[4]

AFL in India had filed both civil and criminal complaints against its shareholders, Randhawas, which contained documents duly authenticated, attested and notarized by the American Embassy and attached to the Indian complaint. These documents proved that 1) AFL was indeed a duly organized and existing Indian corporation, 2) AFL had received

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[4] Verstegen testified during trial that she could not get any reply from AFL in India during these 19 months of investigation prior to filing of the Notice of Disciplinary Charges. After filing of NDC, Verstegen and Murray had another full twelve months to contact AFL before the trial started. At the trial, Verstegen testified that she never heard from AFL. App. 55, quoting footnote, State Bar exhibit 28, p.3. Relying on this testimony, the judge concluded that AFL was non-existent in India. App. 40, 57, 60.

funds for the account of Randhawas from Padam K. Khanna of Berkeley, CA, 3) AFL officers had been in correspondence with Randhawas, 4) AFL's Chairman and Director of Finance had written a letter explaining and answering State Bar investigator's enquiries and mailed that letter via DHL international with a copy of the Airway Bill and that 5) AFL had issued a stock certificate showing the value of Randhawas' investment in the company and value of its investment. The Magistrate Judge stated that, "First, Mr. Khanna has failed to demonstrate that the most compelling of his new evidence – in particular, the certificate of incorporation and the share certificate – is actually new evidence or evidence previously unavailable to him." App. 35. Ninth Circuit in its memorandum stated that "Khanna's 'new evidence' does not prevent the application of collateral estoppel because Khanna has not demonstrated that the Indian complaint and attached documents were preiusly unavailable, establish a previously undiscovered legal theory, or change his legal rights. See *Ross v. Alaska*, 189 F.3d 1107, 1110 (9th Cir. 1999)." App. 4.

The Indian Judgment, App. 87-98 was issued over two years *after* the California Supreme Court rendered the final summary judgment. Petitioner had no control whatsoever over the Indian Court's decision. The process of legalization of documents which can be accepted and admitted in the U.S. Courts is very cumbersome and time consuming as it must follow the Hague Legalization of Foreign Documents Convention. State Bar trial ended on

August 19, 2004. Judge McElroy's decision was announced on October 20, 2004. State Supreme Court petition was filed on April 10, 2006 and Supreme Court's summary decision was issued on June 21, 2006. AFL filed the Indian complaint May 8, 2007. Indian Court decision was issued on August 22, 2008.

Judge McElroy ruled that 1) AFL was a non-existent company. App. 40, 54, 57, 60. 2) the documents were not sent from India but were hand delivered to complainants by Petitioner with the implication that somehow Petitioner manufactured them. App. 55. 3) AFL never received the funds and Petitioner used those funds for his personal use. App. 48. Apparently, according to Judge McElroy, these are the salient lies which Petitioner committed before the State Bar Court Judge and according to McElroy and the State Bar Reply Brief, they were more egregious than the conduct previously being investigated. Judge McElroy further stated that these lies of Petitioner amounted to commission of moral turpitude and therefore she suspended him from the practice of law as she assumed that she had the authority to do so.[5]

The Magistrate Judge wrote in his decision that there was an unavoidable inference from Supreme Court's disbarment order that there was no investment

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[5] In the Reply Brief, the State Bar states, "Judge McElroy noted in her decision that Khanna's lies to the Court and to the State Bar were more egregious than the conduct initially being investigated." E.R. at 132:13-20; 137:6-28.

in AFL. App. 33. The documents, submitted with the complaint, are at the heart of the entire case and very obviously repudiate all the charges.[6] If these documents are admitted into evidence, they would change the entire picture.

The Indian Judgment, in stark contrast and very clearly, alters the entire spectrum of the trial conducted at the State Bar Court. Indian Judgment proved that AFL was a genuine Indian company duly incorporated under the Indian laws which the Indian courts are well aware of. App. 89. The Indian judgment proves that Randhawas were registered shareholders of AFL. App. 89. The Indian judgment proves that Randhawas were issued stock certificate of the company. App. 89 The Indian judgment proves that AFL did in fact receive the money sent by Petitioner for the account and credit of Randhawas. App. 89. The Indian judgment proves that Randhawas were in touch with AFL. App. 89.

There is a long standing principle of comity recognized in this country since 1895. See *Hilton v. Guyot*, 159 U.S. 113, 163-164 (1895). Furthermore, the Indian Court had full jurisdiction over Randhawas as they were the legitimate shareholders of an Indian company and are the owners of real

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[6] These documents duly attested, authenticated and notarized in accordance with The Hague Convention of Legalization of Foreign Documents are part of the records of the complaint with the District Court.

estate and agricultural property in India. Randhawas were properly served with the Indian summons and complaint at their residence in Hercules, California, U.S.A. Newspaper notices as approved by the Indian Civil Procedure guidelines were issued. The default judgment, after an extensive hearing and proper vetting of AFL documents and AFL officers' physical testimonies in the open court, should be recognized in this country.[7] Furthermore as there was no fraud present, this Indian judgment should be recognized in our Federal and State Courts and accorded Full Faith and Credit under our Constitution.[8] See also *Chaudry v. Chaudry*, 159 N.J. 566 (App. Div.), *cert. denied*, 78 N.J. 335 (1978).

Assuming the money judgment is not granted recognition, the documents attached to the Indian complaint and to the complaint filed in the District Court should be admitted as they make true the conditions laid down by the Hague Legalization of Foreign Documents Convention.

Petitioner respectfully submits to this Highest Court that this evidence contrary to the Ninth Circuit holding does put forth the legal theory of suppressing, spoliating and manufacturing of evidence, perjury

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[7] See Uniform Foreign-Country Money Judgments Recognition Act (2005).

[8] See also *Hague Convention on Foreign Judgments in Civil and Commercial Matters*. India is a member.

and conspiracy and deprives Petitioner of his constitutional rights.

If this ruling by the District Court and affirmed by the Ninth Circuit is allowed to stand, it would be the first of its kind. Its effect could subject hundreds of thousands of Indian immigrants in the U.S. and others doing business transactions involving India to lawsuits related to authenticated, attested and notarized immigration and other official documents, such as birth certificates, marriage and education records, business and corporate records, Indian Court judgments and other public records, admitted in the U.S. Courts, universities, colleges and corporate world.

The documents, similarly authenticated under the Hague Convention have been admitted in almost all federal Courts of the United States even the Ninth Circuit. See, *Societe National Industrielle Aerospatiale v. U.S. District Court,* 107 S.Ct. 2542 (1987); *In re Grand Jury Proceedings: The Bank of Nova Scotia II*, 740 F.2d 817 (11th Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985); 105 S.Ct. 778 (1985); *United States v. Bank of Nova Scotia I,* 691 F.2d 1384 (11th Cir. 1982), *cert. denied*, 103 S.Ct. 3086 (1983); *Richmark Corp. v. Timber Falling Consultants,* 959 F.2d 1468 (9th Cir. 1992); *In re Perrier Bottled Water Litigation,* 138 F.R.D. 348 (D. Conn. 1991); *Reinsurance Co. v. Administratia Asigurarilor de Stat,* 902 F.2d 1275 (7th Cir. 1990); *In re Grand Jury Proceedings Yanagihara,* 709 F. Supp. 192 (C.D. Cal. 1989); *United States v. Rubin,* 836 F.2d 1096 (8th Cir. 1988); *Hudson v. Hermann Pfanter GmbH & Co.*, 117 F.R.D.

33 (N.D.N.Y. 1987); *United States v. Davis*, 767 F.2d 1025 (2d Cir. 1985); *Graco, Inc. v. Kremlin, Inc.*, 101 F.R.D. 503 (N.D. Ill. 1984); *Laker Airways Ltd. v. Pan American World Airways*, 103 F.R.D. 42 (D.D.C. 1984); *United States v. Pan American World Airways*, 103 F.R.D. 42 (D.D.C. 1984); *United States v. Toyota Motor Corp.*, 569 F. Supp. 1158 (C.D. Cal. 1983); *Hong Kong and Singapore Bank Corp. v. Commissioner*, 85 T.C. No. 41 (Nov. 5, 1985); *United States v. First National Bank of Chicago*, 699 F.2d 341 (7th Cir. 1983); *United States v. Vetco*, 691 F.2d 1281 (9th Cir.), *cert. denied*, 454 U.S. 1098 (1981); *SEC v. Banca della Svizzera Italiana*, 92 F.R.D. 111 (S.D.N.Y. 1981); *In re Uranium Antitrust Litigation*, 480 F. Supp. 1138 (N.D. Ill. 1979); *In re Westinghouse Elec. Corp. Uranium*, 563 F.2d 992 (10th Cir. 1977); *Federal Maritime Commission v. DeSmedt*, 366 F.2d 464 (2d Cir.), *cert. denied*, 385 U.S. 974 (1966); *Societe Internationale v. Rogers*, 357 U.S. 197 (1958).[9]

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[9] Petitioner wishes to stress to this Court that this treaty also should be regarded as the supreme law of the land under the Supremacy Clause.

The Supremacy Clause, Article VI, Clause 2 of the United States Constitution reads as follows:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the land; and the judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

(Continued on following page)

A. Doctrine of Collateral Estoppel:

The preclusive effect of a state court judgment in a federal proceeding is governed by state law. *Intel Corp. v. Advanced Micro Devices, Inc.*, 12 F.3d 908, 914-915 (9th Cir. 1993), *cert. denied*, 114 S.Ct. 2675 (1994); see also 28 U.S.C. § 1738. See also the case cited by the Ninth Circuit, *Ross v. Alaska*, 189 F.3d 1107, 1110 (9th Cir. 1999).

It is extremely disheartening to note that the Ninth Circuit would simply ignore the most crucial factor of **full and fair opportunity** to litigate the issues and instead quote a misleading case, *Cal-Micro, Inc. v. Canterell*, 329 F.3d 119, 123 (9th Cir. 2000), with a very different set of facts. *Cal-Micro* is a case where defendant filed a motion to set aside a default judgment against him that was denied because of the time limitation. On the issue of collateral estoppel, the Court ruled that defendant had ample opportunity to contest the default judgment. Despite the full and fair opportunity, he did not do so. In our case, our facts differ fundamentally: no opportunity was provided to litigate the conspiracy.

The Supremacy Clause establishes the Constitution, Federal Statutes, and U.S. treaties as "the supreme law of the land." The Constitution is the highest form of law in the *American* legal system. State judges are required to uphold it, even if state laws or treaties conflict with it. This Hague Legalization of Foreign Documents Convention in fact augments the Constitution and in no way interferes with it. It is therefore respectfully submitted that the documents should be made admissible under the Hague Treaty.

The conspiracy charges were never litigated. The State Bar trial was about disciplinary charges against Petitioner. Conspiracy was detected after the trial was over. Under California law, collateral estoppel does not apply to an issue which could not have been raised in the prior proceedings. *Chern v. Bank of America,* 15 Cal.3d 866, 871-872 (1976) ['different historical transaction']; *Vella v. Hudgins*, 20 Cal.3d 251, 255 (1992) [limited nature of issues which may be asserted in unlawful detainer; cross-complaints generally not allowed]. For collateral estoppel to apply, the issue litigated in the prior case must be the same as the issue in the current case. *People v. Sims*, 32 Cal.3d 468, 484 (1982).

The allegations of conspiracy are against State Bar investigator and the trial attorney, Albertsen-Murray only. No conspiracy charges have been alleged against Judge McElroy. Petitioner must be granted his right to cross-examine Murray and Verstegen before a jury who should decide this issue. The right of confrontation is "[o]ne of the fundamental guarantees of life and liberty . . . long deemed so essential for the due protection of life and liberty that it is guarded against legislative and judicial action by provisions in the Constitution of the United States and in the constitutions of most if not of all the States composing the Union." *Kirby v. United States*, 174 U.S. 47, 55, 56 (1899). *Cf. Pointer v. Texas*, 380 U.S. 400, 404-405 (1965).

It is respectfully submitted that the doctrine of collateral estoppel should not be applied under this set of facts

II. CERTIORARI SHOULD BE GRANTED TO DEFINE THE UNCHARTERED AREAS OF JUDICIAL IMMUNITY LIMITS, IF ANY, GUARANTEED TO STATE BAR COURT JUDGES.

This case illustrates clear abuses of discretion by the State Bar Court Judges, which have no parallel in eighty-three years of attorney disciplinary proceedings in California. In our case, the judge can erase one hour forty minutes of trial testimonial tape that is in her sole and exclusive possession. See *infra*. She can suspend the license of the charged attorney without the Supreme Court order because one state statute authorizes her to do so, *infra*. She can deprive the charged attorney his substantive due process rights even when the attorney suffers from arrhythmia in her court during grueling trial, *infra*. She can create her own evidence rules of admission of documents, witnesses and testimonies because the State Bar Court where she is the sole referee and jury does not follow laid down criminal or civil safeguards.[10] She can refuse the assistance of counsel requested by the

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[10] *Emslie v. State Bar*, 11 Cal.3d 210, 225-226 (1974); *Yokozeki v. State Bar*, 11 Cal.3d 436, 446 (1974); *In re Rose*, 22 Cal.4th 430, 436 (2000).

charged attorney because she has the power to do so.[11] She can deny the request for a continuance at the

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[11] The Supreme Court of California stated in *In the Matter of Ainsworth*, 46 Cal.3d 1218 (1988), that: "Moreover, State Bar proceedings are generally regarded as quasi-criminal in nature, and a State Bar member is not entitled to traditional criminal procedure safeguard. (Citations). Finally we have recognized that although a State Bar member is entitled to a "reasonable" opportunity to be represented by counsel, it is the attorney's responsibility. (Citations)." *Id.* at 1230. Here, however, the judge denied Petitioner's request for the help of an attorney at Petitioner's own expense, when Petitioner, because of his poor health, could not continue.

> MR. KHANNA: Your Honor, can I ask for a continuance because I do not have (testimony missing). I feel here, very strongly, that I do not have the ability here to really question and I am taking the time of this Court and I (testimony missing).
>
> THE COURT: No, I think I'll. . . . I'll give you five minutes to compose yourself and think of questions.
>
> MR. KHANNA: I need to get a lawyer. I just need to get a lawyer.
>
> THE COURT: At this point. It's (testimony missing).
>
> MR. KHANNA: This is very crucial (testimony missing) a very crucial matter. False statements have been filed with the State Bar, and I need somebody to kind of help me, and I am asking that I need to get (testimony missing).
>
> THE COURT: I am not going to give you a continuance.
>
> MR. KHANNA: OK, all right your Honor.
>
> THE COURT: You had two lawyers in this case. They represented you ably, and for some reason, they are not representing you, and we need to proceed.
>
> MR. KHANNA: Yes (testimony missing).

T.T. II-54:5-24.

(Continued on following page)

close for Petitioner to call his character witnesses because he had not subpoenaed them.[12] She can call the complaining witness credible even if he has three DUI arrests in a span of two years and has served jail time.[13] She can ignore the blatant perjury committed under oath in her court.[14] She can admit a new charge

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California courts have held that a party to an administrative proceeding is entitled to be represented by an attorney retained by him where the proceeding is of such a nature that the party's interest might be prejudiced if he is denied the right to a counsel. *Steen v. Board of Civil Service Commrs.*, 26 Cal.2d 716, 727 (1945).

[12] T.T. page III-74.

[13] T.T. page I-136:8-16.

[14] During the trial Baljit Randhawa testified under oath that it was she who was cited for a ticket for driving without a license on an American freeway. Over 1.2 billion people of India would consider Ms. Baljit Randhawa as a person with super powers for driving for the first time in her life and that too on American freeways when she had never driven a car and had never been out of India all her life. She had arrived in the United States a few months earlier for the first time. Incidentally people drive on the left side in India and the steering wheel is on the right. This was pointed out to the judge. Furthermore, an affidavit duly signed by her in support of her TRO against her husband was presented to the Family Court of Contra Costa County a few months AFTER this incident. In that affidavit she testified under oath that she had never driven a car. This fact was introduced at the trial. However, the judge found that this obvious and deliberate perjury did not affect her credibility. In other words a blatant and unquestionable perjury is permitted in the State Bar Courts. See T.T. III-60:24-25, 61:1-9 and T.T. II-73: 8-25, 9:1-2. Her husband testified that on that occasion he was not even in the car. T.T. I-181:21-25 and I-182:1-6. Husband's court testimony must be compared with wife's Affidavit in support of TRO.

of Petitioner receiving another $6,000 in cash without any receipt from complainants during trial, surprising the Petitioner with this new development, and depriving him of any preparation for defense.[15] She can speculatively charge Petitioner with criminal trespass in the State Bar investigator's office to place the letter at her desk in order to justify her excluding this exculpatory evidence.[16]

However, the greatest personal and intentional prejudicial attack by her centers upon her accusations that Petitioner lied to the State Bar Court about AFL, the letters from AFL, the money sent and received by AFL She labeled these statements as lies that were more "egregious than the conduct initially being investigated." *Appellee's State Bar's Reply Brief, page 5, dated February 19, 2008.* The initial conduct that was being investigated was whether clients' money was sent to AFL or used by Petitioner for his personal use and whether AFL was a genuine corporation in India. Petitioner's two attorneys had submitted AFL corporate papers, including AFL Certificate

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[15] Notice of Disciplinary Charges (NDC) mentioned only $25,000 and that is what the complainants filed a complaint about. No amendment was added to the NDC. See *Woodars v. State Bar*, 16 Cal.2d 755 (1940). "The right to practice law is a valuable one which should be suspended or revoked only on charges alleged and proved and as to which full notice and opportunity to defend have been accorded."

[16] T.T. 11-1:2.

of Incorporation but had failed to get these documents authenticated, attested, and notarized for admission as evidence.

Some of the acts outlined above might qualify as "judicial acts," and some of these acts might be considered as judgment errors which might fall under judicial immunity. However, Petitioner believes that the following three acts have deliberately, wantonly and knowingly been undertaken by the judge to cause grave harm and injury to Petitioner in a very cruel manner.

A. Exercise of Authority Without Jurisdiction:

The authority to suspend and disbar attorneys is exclusively vested in the Supreme Court of California. Mr. Chief Justice Rehnquist stated in *Keller v. State Bar of California,* 496 U.S. 1 (1990), that "The State Bar does not admit anyone to the practice of law, it does not finally disbar or suspend anyone and it does not ultimately establish ethical codes of conduct. All of those functions are reserved by California law to the State Supreme Court." 496 U.S. at 12.

However, State Bar Judge McElroy suspended Petitioner's license to practice law, pursuant to Business and Professions Code § 6007(c)(4), effective three days after her decision, which she rendered on

October 20, 2004.[17] This state statute gives the authority to the Board of the State Bar as the final authority and policy maker and not the Supreme Court of California. Acting under this authority, State Bar Court Judge suspended Petitioner's license by placing him on an involuntary inactive list. Since the U.S. Supreme Court decision in *Keller* well establishes that the Supreme Court of California has the final and inherent authority to suspend or disbar attorneys, Judge McElroy's decision contradicts the U.S. Supreme Court. See, *Keller v. State Bar of California*, 47 Cal.3d 1152, 1160 (1989); *In re Attorney Discipline System,* 19 Cal.4th 583, 592-593 (1998); *O'Brien v. Jones*, 23 Cal.4th 40, 46 (2000); and in *In re Rose*, 22 Cal.4th 430, 441-442 (2000).

In 42 U.S.C. § 1983 cases, such as in *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988), Justice O'Connor, writing for the plurality, reinforced the principle articulated in *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986), 63, 64, 65-66, 67 that state law will be used to determine policymaking status. 485 U.S. at 124. Also identifying the policy making official is a question of law, for the court to decide by reference to state law. 485 U.S. at 124.

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[17] Business and Professions Code § 6007(c)(4) states: The board shall order the involuntary inactive enrollment of an attorney upon the filing of a recommendation of disbarment after hearing or default. For purposes of this section, that attorney shall be placed on involuntary inactive enrollment regardless of the membership status of the attorney at the time.

This Court must decide who, under these circumstances, has the final authority as a policymaker to suspend the license of an attorney thus, in this case, depriving him of his due process rights. This issue is absolutely undecided and affects over 220,000 attorneys in California.

This suspension of Petitioner lasted for about 20 months before the Supreme Court issued a "final" judgment of summary disbarment. Petitioner strongly believes that the State Bar Court Judge grossly violated Petitioner's due process rights by suspending his license 20 months prior to the state Supreme Court's final judgment of summary disbarment. Petitioner also believes that Judge McElroy's act of suspending Petitioner's license is not a judicial act and is similar to Judge White dismissing a court employee in *Forrester v. White*, 484 U.S. 219 (1988) where the Supreme Court ruled that a state-court judge did not have absolute immunity from a damages suit under 1983 for his decisions to demote and dismiss a court employee. *Id.* at 223-230.

Judge McElroy acted very much out of her 'jurisdiction,' which is to be broadly construed. *Stump v. Sparkman*, 435 U.S. 349 (1978) at 356. The *Stump* court articulated that the court should determine whether the judge's function, such as suspension of

license, is one "normally performed by a judge."[18] *Stump*, 435 U.S. at 362. This particular act of suspending Petitioner's license was done "in the clear absence of jurisdiction," for which no immunity is afforded as the suspension of Petitioner or any attorney's license is in the jurisdiction of the State Supreme Court only, see *Keller v. State Bar of California*, 496 U.S. 1 at 12. A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority, but *rather he will be subject to liability only when he has acted in the "clear absence of all jurisdiction,"* [emphasis added] *Bradley v. Fisher,* 80 U.S. (13 Wall.) 335 (1871).

B. Violation of Substantive Due Process:

Petitioner respectfully cites the following incident which occurred on the second day of trial at the State Bar Court. The trial had started at around 9 A.M. After an hour lunch break, it was continued till the late afternoon. Petitioner is a heart patient. The stress and grueling trial, without the help of an attorney and a court reporter, caused a severe case of atrial fibrillation which caused dizziness, lightheadedness and Petitioner's pulse jumped to 240 to 250 beats per minute. It was 4:30 P.M. Petitioner humbly requested the judge to adjourn for the day

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[18] In this situation by a judge of the Supreme Court only. Act of suspension of license is not a function which is normally performed by an administrative judge or a "*sui generis*" judge.

because Petitioner was not feeling well. The judge ridiculed Petitioner and ruled that he must complete his cross-examination. The only neutral witness at the trial was the Punjabi translator. Here is the transcript of the incident:

> MR. KHANNA: I am tired, your Honor. I just can't do (testimony missing-faulty recording which is indiscernible) its 4:30 and I'm (testimony missing).
>
> THE COURT: No, I understand that, but you need to – (testimony missing) if you're going to ask her questions – (testimony missing).
>
> MR. KHANNA: I am very sick and I'm not feeling well, your Honor, and I can get you a doctor's certificate, if that's needed.
>
> THE COURT: I understand that, but the witness is here and she – (testimony missing).
>
> MR. KHANNA: I just am not in a position, your Honor. I'm sick.
>
> THE COURT: Do you have questions to ask her?
>
> MR. KHANNA: Yes, a lot. A lot of questions to ask her.
>
> THE COURT: Well, you need to ask her at least questions till 5:00.
>
> MR. KHANNA: I can't do it right now in half an hour.

THE COURT: No one is saying that you have to complete it in half an hour, but what we are saying is that you have to begin to ask her questions.

MR. KHANNA: Your Honor, I'm requesting very humbly that I'm tired. I am not well.

THE COURT: I understand that. I'm asking – (testimony missing).

MR. KHANNA: I have a heart condition and I don't think I can carry on. I need – (testimony missing) I need help to do it tomorrow morning.

THE COURT: Well, what we – what do you mean?

MR. KHANNA: I have to cross-examine her tomorrow.

THE COURT: Right, and what I'm suggesting is that you cross-examine her until 5:00. Ask her questions until 5:00, and then we will take a break.

MR. KHANNA: I want to – (testimony missing) Your Honor. I'm just not well and I'm being forced to do that. This is just – (testimony missing) anyway, I'll do whatever you say.

THE COURT: Okay, let's proceed. At least, get some questions out, because she cannot keep coming back as a witness.

T.T. pages II-95: 3-25 and 96:1-15.

Petitioner was not even allowed to lie down. Fortunately, Petitioner had his medication with him. He took the recommended dosages of Coumadin and verapamil ahead of his evening schedule. Despite this life threatening disorder, Petitioner carried on his cross-examination, which was, due to his physical state, rambling and meaningless, for the next twenty-five minutes.

The issue before this Court is whether this act of Judge McElroy qualifies as an act of efficient and time saving judgment during the trial or a total indifference to the life of Petitioner. Had Petitioner not had his medicine with him, it was almost certain that some serious incident would have occurred. Deaths have occurred in arrhythmia cases where the medicine or medical help is not available. After the incident, Petitioner consulted his cardio-vascular surgeon, Dr. Edelin, who gave a written opinion which is in the records.

Petitioner believes that his substantive due process rights to life and liberty were knowingly and deliberately violated by Judge McElroy. Medical attention and rest at that moment were paramount, and Petitioner was clearly deprived of these. There were no important government interests – fiscal, judicial, administrative or otherwise, at stake. There was no probative value.

In a number of § 1983 cases, the U.S. Supreme Court has held that the violation of due process is a "flexible concept" that varies with the

particular situation, *Zinermon v. Burch,* 494 U.S. 113, 125 (1990).

The *Zinermon* Court stated:

> This general rule applies in a straightforward way to two of the three kinds of 1983 claims that may be brought against the State under the Due Process Clause of the Fourteenth Amendment. First, the Clause incorporates many of the specific protections defined in the Bill of Rights. A plaintiff may bring suit under 1983 for state officials' violation of his rights to, e.g., freedom of speech or freedom from unreasonable searches and seizures. Second, the Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions "regardless of the fairness of the procedures used to implement them." *Daniels v. Williams*, 474 U.S., at 331. As to these two types of claims, the constitutional violation actionable under 1983 is complete when the wrongful action is taken. *Id.*, at 338.

The issue before this Court is whether the State Bar judge's act of denial of adjournment one half hour before closing was arbitrary, deliberate and wanton disregard of Petitioner's life and whether this ruling violated petitioner's substantive due process rights or not. Almost everyone, attorneys and lay people alike, who heard about this incident and looked at the transcript, agreed that such an indifference shown by

judge with total disregard for one's life, shocked their consciences.

C. Damaged CDs:

This Court must decide whether a State Bar Court judge, who is not an Article VI California Constitution judge, is entitled to judicial immunity if there is a proven case of recorded testimony gone missing while the recording equipment was in her exclusive and sole possession.[19] In fact, one hour and forty minutes of crucial and vital trial testimony of the main complainant disappeared during the time Judge McElroy had exclusive possession of the recording equipment.

After the decision was rendered by the State Bar Court Judge McElroy, copies of the CDs of the trial transcript were delivered to Petitioner. Petitioner was ordered to spend his own time, money and energy to get the CDs transcribed. After four months of expenses and cumbersome procedures, Petitioner received the translation. It was then discovered that one hour and forty minutes of crucial and vital testimony of the main complaining witness was missing and appeared erased.[20] Petitioner immediately demanded a new trial on the strength of *Weinstein v.*

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[19] In State Bar Court proceedings, a charged attorney is not allowed to have a court reporter present even if the attorney opts to pay personally for the Court Reporter's expenses.

[20] T.T. page II-1.

E.F. Hutton & Co., 220 Cal. App.3d 364 (1990).[21] This motion for new trial was denied by the State Bar Court Review Department. A brief cross-examination of the complainant was ordered and it was held about ten months later. During this rehearing, complainant refused to answer 85% (eighty-five percent) of the questions propounded as complainant simply did not remember. Petitioner requested an *in camera* inspection of the recording machine and the tape in the chambers of an impartial judge. This request was also declined and Petitioner has not as of this date seen the damaged recording.

Even the President of the United States who has an absolute privilege and immunity can be compelled to provide conversational tapes for an *in camera* inspection.[22]

In accordance with the United States Supreme Court holding in *United States v. Nixon,* 418 U.S. 683 (1974) that the President of the United States, Mr. Richard M. Nixon, must produce the tapes, Petitioner is respectfully requesting the Court to allow him to examine the recording tape where the State Bar Court claims that one hour and forty minutes of crucial trial testimony was missing. This can be done in an impartial judge's chambers. It is a very legitimate request. Petitioner admits that it might be construed

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[21] The judge did not mention the missing one hour and forty minutes of complainant's testimony in her decision.

[22] *United States v. Nixon,* 418 U.S. 683 (1974).

as speculation. However, given the circumstances, an *in camera* inspection is the only logical solution to put doubts at rest.

This Honorable Court must decide whether State Bar Court Judge has judicial immunity when there are clear and apparent attempts to commit a crime. Our justice system provides protection from criminal acts, even those committed by Presidents of the United States. It is the province and duty of the Supreme Court of the United States, the highest court of our nation, to rule what the law is. See *Marbury v. Madison*, 1 Cranch 137, 177 (1803).

The *Nixon* court stated:

> But this presumptive privilege must be considered in light of our historic commitment to the rule of law. This is nowhere more profoundly manifested than in our view that "the twofold aim [of criminal justice] is that guilt shall not escape or innocence suffer." *Berger v. United States*, 295 U.S., at 88. 418 U.S. 683, 709.

The Ninth Circuit *en banc* panel stated that all claims against Judge McElroy are entitled to judicial immunity and were properly dismissed, citing *Mireles v. Waco*, 502 U.S. 9, 12-13 (1991) and *Crooks v. Maynard*, 913 F.3d 699, 700 (9th Cir. 1990). Appendix 'A' page 2.

Mireles and *Crooks* are very distinguishable. In *Mireles*, the state court judge ordered the police to bring the counsel before the court. The police used

excessive force. The judge's order was considered a judicial act. In our case, the judge denied medical attention. Would denying adjournment of stressful trial proceedings one half hour before closing time when Petitioner suffered a bout of arrhythmia be considered a "judicial act"?

In *Crooks*, the judge used his contempt powers to jail the petitioners. In our case, the State Bar Court Judge does not have any contempt powers as her status is not that of a state court judge. The *Crooks* Court stated that "(E)ven though Judge Maynard did not have contempt power as an administrative judge, he was also a district court judge . . . " 913 F.2d 699-703-707.

The Ninth Circuit, without any comments about the unusual, prejudicial and biased behavior and treatment of Petitioner, has dismissed all the charges against the trial judge by stating that she has judicial immunity.

Petitioner respectfully petitions this Court to please define the parameters, if any, the State Bar Court Judge should observe in imparting justice in a "*sui generis*" court where there is no jury to take notice of the conduct of the trial.

III. CERTIORARI SHOULD BE GRANTED TO RESOLVE CONFUSION AND CONFLICT TO DETERMINE WHETHER STATE BAR OF CALIFORNIA IS A GOVERNMENT AGENCY AND THUS ENTITLED TO ELEVENTH AMENDMENT IMMUNITY (*Hirsh v. Justices of the Supreme Court of the State of California*, 67 F.3d 708 (9th Cir. 1995)) OR IS NOT A TYPICAL GOVERNMENT AGENCY BUT AKIN TO A UNION-SHOP TYPE AGENCY (*Keller v. State Bar of California*, 496 U.S. 1 (1990)).

There is a great conflict and considerable confusion between the Ninth Circuit Court of Appeals decision in *Hirsh v. Justices of the Supreme Court of the State of California,* 67 F.3d 708 (9th Cir. 1995) and the Supreme Court of the United States unanimous decision in *Keller v. State Bar of California,* 496 U.S. 1 (1990). *Keller* declares State Bar of California as an integrated bar that is not a government agency and *Hirsh* overrules *Keller* by designating State Bar of California as an "arm of the state" or as a government agency. By relying on *Hirsh,* the Ninth Circuit in an *en banc* memorandum confirmed *Hirsh* as the law and thus disregarded the Doctrine of *Stare Decisis*.

In *Keller*, Mr. Chief Justice Rehnquist, in very simple and clear English language, stated as follows:

> Of course the Supreme Court of California is the final authority on the "government agency" status of the State Bar of California for

> purposes of state law. But its determination that respondent is a government agency and therefore entitled to the treatment accorded a governor, a mayor, or a state tax commissioner, for instance, is not binding on us when such a determination is essential to the decision of a federal question. 496 U.S. at 11.

Can one assume from this language that Eleventh Amendment sovereign immunity would not be available to the State Bar as it would to a governor, a mayor or a state tax commissioner? Ninth Circuit believes otherwise. Citing *Konig v. State Bar of California*, No. C-04-2210-MJJ, 2004 U.S. Dist. LEXIS 19498 (N.D. Cal. Sept. 16, 2004), the District Court Magistrate Judge ruled that both the Ninth Circuit and other judges in this district "have held that the Eleventh Amendment applies to the State Bar." *Id.* at *7. With respect to *Keller*, Judge Jenkins stated that the case has no relevance in the context of Eleventh Amendment sovereign immunity. The case does not hold, or even suggest, that the State Bar is not entitled to immunity." *Id.* at *9-10.[23] See App. 23.

Petitioner believes that such holding is a frontal attack on the unanimous Rehnquist Court. If, and only if, the Ninth Circuit were to overturn a Supreme Court precedent, it must show and prove some very

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[23] The federal question in *Keller* was the violation of First Amendment and in our case, the federal questions are the violation of Fifth Amendment, Sixth Amendment and Fourteenth Amendment (Due Process and Equal Protection).

compelling, sufficient and countervailing justifications. See *Hilton v. S. C. Pub. Rys. Comm'n*, 502 U.S. 197, 201-203 (1991). Mr. Chief Justice Rehnquist stated that because the State Bar is already required to submit detailed budgets to the state legislature before obtaining approval to set annual dues, the State Supreme Court's assumption that complying with *Abood*[24] would create an extraordinary burden for the Bar is unpersuasive. 496 U.S. at 16-17.

Since Ninth Circuit *Hirsh* case, California court is steadily advocating that State Bar of California is a government agency. The High Court must clarify this ambiguity as to the interpretation of *Keller* by the lower courts.

IV. CERTIORARI SHOULD BE GRANTED BECAUSE STATE BAR INVESTIGATOR WAIVED HER ELEVENTH AMENDMENT AND COMMON LAW IMMUNITY BY TESTIFYING AT TRIAL AND REFUSING TO PRODUCE HER WORK PRODUCT OF MAIL ROOM AND FAX RECORDS.

The Ninth Circuit citing *Broscoe v. LaHue*, 460 U.S. 325 (1983), accorded common law immunity to investigator Verstegen for committing perjury in open court. Verstegen testified at the trial that she found a mysterious envelope at her desk which did not have any stamps. She also testified that she did not know

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[24] *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

if her office or mail room had received a fax sent from India.[25] Petitioner sought the logs of incoming mail and inbound fax journal from Verstegen for the period of August 13, 2003 to October 11, 2003. This request was denied.[26]

In *The North Carolina State Bar v. Douglas S. Harris, Attorney,* No. COA99-580 (Filed 29 August 2000), the Supreme Court of North Carolina ruled that an attorney who was disbarred by the State Bar was entitled to a new hearing where his due process rights were violated by the Hearing Committee's failure to compel production of the State Bar investigator's notes, reports, or memoranda relating to matters about which the investigator testified. By allowing the investigator to testify, the State Bar waived any protection under the work product rule for those materials used on direct examination.

The Court stated:

> However, upon reconsidering our earlier opinion in light of *United States v. Nobles*, 422 U.S. 225, 45 L. Ed. 2d 141 (1975), we now conclude that, by allowing the investigator to testify, the State Bar waived any immunity under the attorney-work product doctrine as to matters testified to by the investigator that were contained in his notes. Accordingly, we hold that defendant's due

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[25] T.T. III-53-54.

[26] App. 24.

process rights were violated by the Hearing Committee's failure to compel production of the State Bar investigator's witness interview notes and memoranda to defense counsel, insofar as they related to matters to which the investigator testified.

CONCLUSION

Petitioner has been described by Judge McElroy as "a danger to the public," someone whose acts of "moral turpitude and dishonesty shock the conscience of the legal profession," and who "degrade[s] the highest possible professional standards for attorneys." He has lived with these harsh, arbitrary, and unwarranted judgments and the State Bar Court and Judge McElroy's intent to shame and disgrace him for over five years. In his entire life, Petitioner has never disobeyed any laws of the land except a few traffic tickets. He has been an excellent, well known project finance lawyer who has been called upon on various occasions to help prestigious firms, such as Gibson, Dunn & Crutcher, White & Case, Akin Gump Strauss Hauer & Feld, and Gray Cary as well as various government agencies of India. He has helped his community and raised a wonderful family. He has never been disciplined before. Now to be disgraced for a single act that he did not commit is extremely painful and emotionally unbearable.

Petitioner, very respectfully, requests this Court to please analyze Judge McElroy's entire decision and

see the prejudice and speculative criminal accusations.

Petitioner has been unable to find another attorney discipline case where a judge has so blatantly discriminated against an attorney in such a manner. It appears Ninth Circuit has not given this case the attention and scrutiny it deserves. It has erred in applying inapplicable case law and giving blanket immunity. It has also added a new precedent to collateral estoppel where the issue gets "necessarily decided" without even being pled.

Petitioner respectfully requests this Honorable Court to allow Petitioner to confront and cross examine the trial attorney and the investigator before a jury for the conspiracy committed by them. In *Addicks v. Kress & Co.*, 398 U.S. 144 (1970), Mr. Justice Black, in a concurring opinion in the judgment, stated: "The existence or non-existence of a conspiracy is essentially a factual issue that the jury, not the trial judge, should decide." 398 U.S. at 176.

Petitioner fears that the State Bar will create problems for him in absolute retaliation when he applies for reinstatement for which he will be eligible after five years of suspension. Petitioner was suspended by the State Bar Judge on October 24, 2004.

There is no case in the entire 83 years of the California State Bar disciplinary proceedings where a white person has been treated in a similar manner to Petitioner, who is thus being forced to believe that these acts of the State Bar Court Judge and prosecutor were

motivated because of Petitioner's race, ethnic origin and religion. It appears that *United States v. Thind*, 261 U.S. 204 (1923) has been revisited. In *Thind,* the Supreme Court took away Thind's citizenship because he was non-white and belonged to a high class Hindu Punjabi family. Here the State Bar Court Judge took away Petitioner's license because, like Thind, he is a non-white Indian and a Hindu. Petitioner is not interested as much in damages as he is interested in clearing his name and honor which he has coveted and protected all his life. Petitioner has unjustly been without a job and suffering from a lack of income for over five years. Petitioner believes that the Supreme Court will apply the correct and applicable law and grant the certiorari which is Petitioner's last resort.

Respectfully submitted,

PADAM KUMAR KHANNA
Pro Se

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PADAM KUMAR KHANNA, Plaintiff-Appellant, v. STATE BAR OF CALIFORNIA; et al., Defendants-Appellees.	No. 07-16692 D.C. No. CV-07-02587-EMC MEMORANDUM* (Filed Jan. 14, 2009)

Appeal from the United States District Court
for the Northern District of California
Edward M. Chen, Magistrate Judge, Presiding**

Submitted December 17, 2008***

Before: GOODWIN, WALLACE, and RYMER, Circuit Judges.

Padam Kumar Khanna appeals pro se from the district court's judgment dismissing for failing to state a claim, his 42 U.S.C. § 1983 action alleging the State Bar of California and three of its employees

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The parties consented to proceed before a magistrate judge.

*** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

violated Khanna's constitutional rights, including his right to a fair trial, due process, equal protection and counsel. We have jurisdiction under 28 U.S.C. § 1291.[1] We review de novo, *Gonzalez v. Metro Transp. Autho.*, 174 F.3d 1016, 1018 (9th Cir. 1999), and we affirm.

The State Bar is an arm of the state and is entitled to Eleventh Amendment immunity. *See Hirsch v. Justices of the Supreme Court*, 67 F.3d 708, 715 (9th Cir. 1995). Employees acting in their official capacities are also entitled to immunity. *See id.* Therefore, all claims against the State Bar and its employees in their official capacities were properly dismissed. Additionally, all claims against Judge McElroy are entitled to judicial immunity and were properly dismissed. *See Mireles v. Waco*, 502 U.S. 9, 12-13, 112 S.Ct. 286, 288-89, 116 L.Ed.2d 9 (1991); *Crooks v. Maynard*, 913 F.3d 699, 700 (9th Cir. 1990).

The Claims against the defendants in their individual capacities are also barred. Verstegen is entitled to immunity under the common law for her alleged acts of perjury as a witness. *See Briscoe v. LaHue*, 460 U.S. 325, 345-46, 103 S.Ct. 1108, 1120-21, 75 L.Ed.2d 96 (1983); *Burns v. County of King*, 883 F.3d 819, 821 (9th Cir. 1989). Khanna is collaterally

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[1] Contrary to the State Bar's contention, we do not lack jurisdiction under the *Rooker-Feldman* doctrine, because "the federal plaintiff does not complain of a legal injury caused by a state court judgment, but rather of a legal injury caused by an adverse party." *Noel v. Hall*, 341 F.3d 1148, 1161 (9th Cir. 2003).

estopped on his conspiracy claims against Abersen-Murray and Verstegen because he pled them to the California Supreme Court, and it implicitly rejected them when it disbarred Khanna. *See Cal-Micro, Inc. v. Cantrell*, 329 F.3d 1119, 1123 (9th Cir. 2003) (defining the requirements for collateral estoppel under California law, including that the issue was "necessarily decided" as part of the final judgment). Khanna's "new evidence" does not prevent the application of collateral estoppel because Khanna has not demonstrated that the Indian complaint and attached documents were previously unavailable, establish a previously undiscovered legal theory, or change his legal rights. *See Ross v. Alaska*, 189 F.3d 1107, 1110 (9th Cir. 1999) (stating that federal courts apply state law to determine preclusion); *Roos v. Red*, 130 Cal.App.4th 870, 888 (Cal. App. 2d 2005).

Khanna's motion to expedite is denied as moot.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PADAM KUMAR KHANNA, Plaintiff-Appellant, v. STATE BAR OF CALIFORNIA; PAT MCELROY, Judge of the State Bar of California; TAMMY ALBERTSEN-MURRAY, Deputy Trial Counsel Office of the Chief Trial Counsel, The State Bar of California; ALICE VERSTEGEN, Investigator of the State Bar of California; JAGJIT SINGH RANDHAWA; BALJIT RANDHAWA, Defendants-Appellees.	No. 07-16692 D.C. No. CV-07-02587-EMC Northern District of California, San Francisco **MANDATE** (Filed Mar. 26, 2009)

The judgment of this Court, entered 1/14/09, takes effect this date.

This constitutes the formal mandate of this court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

Molly C. Dwyer
Clerk of Court

By: Lee-Ann Collins
Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

PADAM KUMAR KHANNA, Plaintiff, v. STATE BAR OF CALIFORNIA, *et al.*, Defendants. /	No. C-07-2587 EMC **ORDER GRANTING DEFENDANTS' MOTION TO DISMISS** (Filed Sep. 10, 2007) **(Docket No. 5)**

Plaintiff Padam Kumar Khanna has filed suit against Defendants the State Bar of California, Pat McElroy (a judge for the State Bar Court), Tammy Albertsen-Murray (deputy trial counsel for the State Bar), and Alice Verstegen (an investigator for the State Bar). According to Mr. Khanna, Defendants violated his constitutional rights including his right to a fair trial, due process, equal protection, and counsel. *See* 42 U.S.C. § 1983. Currently pending before the Court is Defendants' motion to dismiss. Defendants argue that the motion should be granted because, among other things, they are protected by Eleventh Amendment and judicial/quasi-judicial immunity.

Having considered the parties' briefs and accompanying submissions, as well as the oral argument of counsel, the Court hereby **GRANTS** Defendants' motion to dismiss.

I. FACTUAL & PROCEDURAL BACKGROUND

According to Mr. Khanna, he practiced law in the state of California from 1979 to 2004, when he was involuntarily disbarred. *See* Compl. ¶ 20 & Ex. 2 (State Bar Court decision, dated 10/21/04). Mr. Khanna was disbarred based on a complaint made by Jagit [sic] Singh Randhawa and Baljit Randhawa (husband and wife), whom he represented in 1996 and 1997. *See id.* ¶¶ 27, 29. The complaint was made on November 19, 2001. *See id.* ¶ 29.

The State Bar initiated proceedings against Mr. Khanna on June 25, 2003. *See id.*, Ex. 2, at 2 (State Bar Court decision, dated 10/21/04). On October 20, 2004, Judge McElroy, a judge for the State Bar Court, issued a decision recommending that Mr. Khanna be disbarred based on, *inter alia,* a finding that Mr. Khanna misappropriated from the Randhawas $31,000. *See id.*, Ex. 2, at 13. According to Judge McElroy, the Randhawas gave Mr. Khanna $31,000 to invest in an Indian company, Amerindia Foods Limited ("AFL"), which never even existed. *See id.*, Ex. 2, at 4-11, 13 (concluding that Mr. Khanna "engaged in a scheme to defraud the Randhawas out of their money by luring them to invest in a nonexistent company and then spent their money on his personal expenses").

Importantly, the recommendation of the State Bar Court is not a dispositive ruling disbarring members. It is a recommendation to the California Supreme Court which makes the ultimate decision *de*

novo. See In re Rose, 22 Cal. 4th 430, 436 (2000) ("The State Bar Court exercises no judicial power, but rather makes recommendations to this court [*i.e.,* the California Supreme Court], which then undertakes an independent determination of the law and the facts, exercises its inherent jurisdiction over attorney discipline, and enters the first and only disciplinary order."). In this case, after the State Bar Court issued its recommendation, Mr. Khanna filed a petition for review with the California Supreme Court challenging the recommendation. *See* Def.'s RJN, Ex. H (petition for review).[1] On June 21, 2006, the California Supreme court rejected his petition and issued an order disbarring Mr. Khanna. *See id.,* Ex. I (order, filed 6/21/06).

Mr. Khanna's complaint herein is brought against the State Bar and employees involved in the investigation and hearing, but not against the California Supreme Court. He asserts the following causes of actions:

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[1] Defendants have asked the Court to take judicial notice of papers and orders filed in the State Bar Court and California Supreme Court proceedings. The Court hereby grants the request. Mr. Khanna has not opposed the request for judicial notice; moreover, it is appropriate for the Court to take judicial notice of such documents. *See, e.g., United States ex rel. Robinson Rancheria Citizens Council,* 971 F.2d 244, 248 (9th Cir. 1992) (taking judicial notice of "directly related" and potentially "dispositive" state court proceedings, even where information was not before the district court, when reviewing district court grant of motion to dismiss).

(1) Violation of the Fifth Amendment (the right to a fair trial).

(a) According to Mr. Khanna, he was deprived of the right to a fair trial because Judge McElroy (1) deliberately erased from the recorded CDs of the trial proceedings over 100 minutes of testimony by Mr. Randhawa on cross-examination, *see* Compl. ¶ 53, and (2) found Mr. Randhawa's testimony credible even though Mr. Randhawa admitted to making false statements in his complaint to the State Bar and even though there were obvious lies and contradictions in his testimony. *See id.* ¶ 57.

(b) According to Mr. Khanna, he was further deprived of the right to a fair trial because Ms. Verstegen, an investigator for the State Bar, committed perjury when (1) she denied ever having received responses to her letter inquiries to AFL and (2) she claimed that a letter that she did receive from AFL was not delivered by mail but "mysteriously appeared at her desk." *Id.* ¶ 59; *see also id.*, Ex. 2, at 10-11 (State Bar Court decision, dated 10/20/04) (stating that a "suspicious letter [from Mr. Khanna's brother, the purported chairman of AFL,] was delivered to the State Bar in an envelope without any postage markings and Verstegen was never able to track down its origin of mailing"; concluding that Mr. Khanna "somehow had the letter delivered to the

State Bar and not necessarily from India").

(c) According to Mr. Khanna, he was also denied a right to a fair trial because (1) the proceedings before the State Bar Court "took five and one half years to complete," *id.* ¶ 62, and (2) the State Bar Court proceedings took place without a court reporter and instead were only recorded. *See id.* ¶ 60.

(d) Finally, according to Mr. Khanna, he was denied a right to a fair trial because the Notice of Disciplinary Charges stated only that the Randhawas gave him $25,000 to invest in AFL. *See id.* ¶ 64. It was a "complete surprise to [Mr. Khanna]" when Ms. Albertsen-Murray "had the witness Jagjit [Randhawa] testify that he gave another $6,000 to [Mr. Khanna, for a total of $31,000]." *Id.*

(2) Violation of the Fourteenth Amendment (the right to due process).

(a) It appears that Mr. Khanna is making both a procedural due process claim and a substantive due process claim. With respect to procedural due process, he asserts that his rights were violated because the California Supreme Court did not give him a judicial hearing to challenge the State Bar Court decision and provided him with only a summary written opinion. *See id.* ¶ 67.

(b) With respect to substantive due process, Mr. Khanna asserts that his rights were violated because "neither the California Legislature nor the Supreme Court has authorized a trial judge of the State Bar to suspend an attorney and take away his right to make a living." *Id.* ¶ 66. Mr. Khanna further asserts that his rights were violated because the State Bar Court's finding that he misappropriated $25,000 was not supported by the evidence. *See id.* ¶ 68 (noting that there was a letter from AFL which stated that the Randhawas had deposited ten lakhs of Indian rupees with the company for investment).

(3) Violation of 42 U.S.C. § 1985(2) (conspiracy to interfere with civil rights).

(a) According to Mr. Khanna, Ms. Albertsen-Murry [sic] (the prosecutor) and Ms. Verstegen (the investigator) "conspired to destroy, spoliate and hide [an] exculpatory [letter] from the trial judge." *Id.* ¶ 71. The exculpatory letter is the letter from Mr. Khanna's brother. The State Bar Court judge did not find the letter to be exculpatory, stating that a "suspicious letter [from Mr. Khanna's brother, the purported chairman of AFL,] was delivered to the State Bar in an envelope without any postage markings and Verstegen was never able to track down its origin of mailing" and concluding that Mr. Khanna "somehow had the letter

delivered to the State Bar and not necessarily from India." *Id.*, Ex. 2, at 10-11 (State Bar Court decision, dated 10/20/04).

(4) Violation of the Fourteenth Amendment (the right to equal protection).

(a) According to Mr. Khanna, the "State Bar Court proceedings violated [his] right to equal protection . . . in that [he] was tried for an act constituting *moral turpitude.*" *Id.* ¶ 74 (emphasis in original).

(5) Violation of 18 U.S.C. § 1621 (perjury).

(a) According to Mr. Khanna, Ms. Verstegen (the investigator) committed perjury when (1) she denied ever having received responses to her letter inquiries to AFL and (2) she claimed that a letter that she did receive from AFL was not delivered by mail but "mysteriously appeared at her desk." *Id.* ¶ 86.

(6) Violation of the Sixth Amendment (the right to counsel).

(a) According to Mr. Khanna, his Sixth Amendment right to counsel was violated because he was not given the opportunity to have an attorney represent him in a case in which he was being tried for moral turpitude.

Based on the above claims, Mr. Khanna seeks compensatory damages in the amount of $2,000,000 as well as punitive damages. *See id.* ¶¶ 95-97. Mr. Khanna does not seek, as ultimate relief, an injunction

overturning the decision of the California Supreme Court and reinstating his membership in the bar. While, in his complaint, Mr. Khanna did ask that the Court direct the California Supreme Court to reinstate him as an active and honorable member of the State Bar until this case is decided, *see id.* ¶ 91, Mr. Khanna withdrew this request for provisional relief at the hearing on the motion to dismiss.[2]

II. DISCUSSION

In their motion to dismiss, Defendants make several arguments as to why the case should be dismissed. First, they argue that the State Bar is immune from suit under the Eleventh Amendment and that the State Bar employees are immune under the Eleventh Amendment when sued in their official capacities. As for the claims against the employees in their individual capacities, Defendants maintain that the employees are protected by judicial or quasi-judicial immunity. Second, Defendants contend argue that the *Rooker-Feldman* doctrine bars Mr. Khanna's claims. Third, Defendants assert that Mr. Khanna's claims are barred under res judicata and collateral estoppel grounds. Finally, Defendants argue that Mr. Khanna has failed to state a claim for relief.

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[2] In his complaint, Mr. Khanna also asked that the Court direct the State Bar not to destroy logs of its incoming mail and fax registry for the period of August 11 – October 11, 2003. *See* Compl. ¶¶ 93-94.

A. *Rooker-Feldman*

Where federal constitutional violations are asserted, federal question jurisdiction usually vests under 28 U.S.C. § 1331. *Rooker-Feldman* creates an exception which arises out of a negative inference from 28 U.S.C. § 1257, the statute that grants jurisdiction to review a state court judgment to the United States Supreme Court only, and not, *e.g.*, a federal district court.

"The *Rooker-Feldman* doctrine stands for the proposition that 'a federal district court does not have subject matter jurisdiction to hear a direct appeal from the final judgment of a state court.'" *Manufactured Home Communities, Inc. v. City of San Jose,* 420 F.3d 1022, 1029 (9th Cir. 2005) [hereinafter *MHC*]. As the Ninth Circuit has explained, *Rooker-Feldman* prohibits a federal district court from exercising jurisdiction over a suit that is a "de facto appeal from a state court judgment." *Kougasian v. TMSL, Inc.*, 359 F.3d 1136, 1139 (9th Cir. 2004). Of course, "[d]etermining what constitutes a forbidden de facto appeal . . . has something proven difficult for the lower courts." *Id.*

In *Noel v. Hall,* 341 F.3d 1148, 1159-61 (9th Cir. 2003), the Ninth Circuit provided guidance as to what constitutes a forbidden de facto appeal. In that case, the court cautioned that the *Rooker-Feldman* doctrine needs to be narrowly construed. Two well-established rules would be in tension with an overly broad reading of *Rooker-Feldman*: (1) the rule that overlapping

or even identical federal and state court litigation may proceed simultaneously, limited only by the doctrines of abstention and comity and (2) the prescribed preclusive effect that federal courts give to state court judgments under 28 U.S.C. § 1738. *See id.* at 1160 (noting that the Supreme Court "has never construed the *Rooker-Feldman* doctrine to give greater preclusive effect to a state council judgment . . . than a judgment would have under § 1738"). Accordingly, a federal district court action "is a forbidden de facto appeal under *Rooker-Feldman* when the plaintiff in the federal district court complaint of a legal wrong allegedly committed by the state court and seeks relief from the judgment of that court." *Id.* at 1163. Where "the federal plaintiff does not complain of a legal injury caused by a state court judgment, but rather of a legal injury caused by an adverse party," *Rooker-Feldman* does not apply. *Id.*

The Ninth Circuit's holding in *Noel* was reaffirmed in *Kougasian,* where the court emphasized that, for *Rooker-Feldman* to apply, the federal plaintiff must seek to set aside the judgment of the state court. *See Kougasian,* 359 F.3d at 1139-40. In neither *Noel* nor *Kougasian* did the federal plaintiff seek such relief. In *Noel,* the federal plaintiff had complained of illegal acts committed by a party against whom he had previously litigated (*e.g.,* wiretapping, breach of partnership fiduciary duties). In *Kougasian,* the federal plaintiff complained that defendants obtained state court judgments by extrinsic fraud. In both cases, the Ninth Circuit held that *Rooker-Feldman*

did not bar jurisdiction, but instead left the matters to traditional claim preclusion analysis, because *Rooker-Feldman* applies only when the federal plaintiff both "asserts as her injury legal error or errors by the state courts *and* seeks as her remedy relief from the state court judgment." *Id.* at 1140 (emphasis in original).

More recently, in *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005), the Supreme Court, consistent with the Ninth Circuit's interpretation of *Rooker-Feldman*, emphasized that the doctrine was limited in scope, being "confined to . . . cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Id.* at 284. The Court pointed out that, in both *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), the two cases that gave rise to the doctrine, the plaintiffs were directly challenging a state court judgment. *See Exxon*, 544 U.S. at 284-85 (noting that, in *Rooker*, the plaintiffs alleged that the "adverse state-court judgment was rendered in contravention of the Constitution" and so should be declared "'null and void'"; and that, in *Feldman*, the plaintiffs were, in part, directly challenging a state court's denial of their petitions seeking waiver of a rule that required bar applicants to have graduated from an ABA-approved law school). Each plaintiff in *Rooker* and *Feldman* "called upon

the District Court to overturn an injurious state-court judgment." *Id.* at 291-92.

Notably, in prescribing the narrow scope of the *Rooker-Feldman* doctrine, the Court emphasized that *Rooker-Feldman* does *not* displace concurrent state and federal jurisdiction over parallel cases or normal preclusion law under § 1738. *See id.* at 292-93. As to preclusion law specifically, the Supreme Court noted that § 1257, which underpins *Rooker-Feldman*, does not "stop a district court form [sic] exercising subject matter jurisdiction simply because a party attempts to litigate in federal court a matter previously litigated in state court." *Id.* at 293. Hence, *Rooker-Feldman*
is limited to cases in which federal plaintiff seeks "review and rejection of [the state-court] judgment," and calls "upon the District Court to overturn an injurious state-court judgment." *Id.* at 291-92.

Exxon Mobil's pronouncement on the limited scope of *Rooker-Feldman* was re-emphasized in a subsequent *per curiam* holding in *Lance v. Dennis,* 546 U.S. 459 (2006). There, the Supreme Court reiterated that the doctrine does not supplant Congress's conferral of federal court jurisdiction concurrent with jurisdiction exercised by state courts and ordinary application of preclusion law. *See id.* at 464. In concurring, Justice Stevens emphasized that, "in *Exxon Mobil,* the Court, finally interred the so-called *Rooker-Feldman* doctrine." *Id.* at 468 (Stevens, J., concurring).

If the Ninth Circuit's interpretation of *Rooker-Feldman* in *Noel* and *Kougasian* left any doubt, it is now clear after *Exxon Mobil* and *Lance* that the *Rooker-Feldman* doctrine does not apply unless the federal plaintiff seeks to "overturn an injurious state-court judgment." *Exxon Mobil,* 544 U.S. at 292. *Rooker-Feldman* does not bar jurisdiction simply because there is concurrent state/federal jurisdiction or where normal preclusion rules apply. The fact that state and federal suits involve overlapping issues or could result in inconsistent factual findings is not sufficient. For *Rooker-Feldman* to apply, there must be a frontal, not collateral, attack upon the state court judgment.

In the case at bar, the requisite to *Rooker-Feldman* is not met. Mr. Khanna does not seek relief from the order of the California Supreme Court disbarring him. Unlike the plaintiff in *Feldman,* he does not seek readmission or reinstatement to the bar. Rather, Mr. Khanna seeks money damages from individuals and the State Bar for alleged wrongs committed by these actors against him. His attack is collateral, not frontal, in that he does not seek to "overturn an injurious state-court judgment." *Id.* The fact that M. [sic] Khanna seeks a result which would be based upon findings inconsistent with those underpinning the California Supreme Court's decision implicates conventional preclusion rules (as discussed below), not a lack of jurisdiction.

Moreover, Mr. Khanna does not assert as a legal wrong an erroneous decision of the California

Supreme Court, but rather the illegal acts of other parties – the named defendants herein. *See MHC,* 420 F.3d at 1030 (*Rooker-Feldman* is applicable where the state court is sued for its actions, not those of an adverse party). This case is thus far more analogous to *Kougasian* where there were allegations of extrinsic fraud on the court rather than *Feldman* in which the final judgment of the District of Columbia court was directly challenged.

Defendants rely on *Mothershed v. Justices of the Supreme Court,* 410 F.3d 602 (9th Cir. 2005), in asserting that *Rooker-Feldman* applies to the instant case. But the case does not support their position. In *Mothershed,* the Ninth Circuit applied the *Rooker-Feldman* doctrine to bar the claims of a federal plaintiff – a disbarred attorney – who was seeking to challenge the state bar disciplinary proceedings leading to his disbarment. *See id.* at 604. The plaintiff was an attorney licensed by the Oklahoma Bar Association who lived and practiced in Arizona. *See id.* The State Bar of Arizona initiated disciplinary proceedings against the plaintiff on the basis that he had unlawfully practiced law in Arizona. *See id.* A default judgment was entered against the plaintiff and the plaintiff was censured for engaging in the unauthorized practice of law. *See id.* at 605. Thereafter, the Oklahoma Bar Association initiated its own disciplinary proceedings against the plaintiff. A trial panel found that the plaintiff had unlawfully practiced law in Arizona, and the Oklahoma Supreme Court entered an order disbarring him. *See id.*

Subsequently, the plaintiff filed suit in the federal district court in Arizona against the justices of the Arizona and Oklahoma Supreme Courts as well as various employees of the state bar associations. *See id.* The plaintiff asserted a claim under 42 U.S.C. § 1983 for due process and other constitutional violations, as well as state law tort claims for interference with contractual relationships, defamation, abuse of process, malicious prosecution, false light, and intentional infliction of emotional distress. *See id.* He sought "damages totaling more than $330 million and an injunction reinstating his membership in the Oklahoma Bar Association and prohibiting the defendants from interfering with his Arizona law practice." *Id.* The Ninth Circuit held that, under *Rooker-Feldman*, the district court lacked subject matter jurisdiction to review the Oklahoma disciplinary proceedings. It further held that the *Rooker-Feldman* doctrine barred the plaintiff's § 1983 and state tort law claims against the Arizona defendants. *See id.* at 607-08.

Mothershed is entirely consistent with *Noel, Kougasian, Exxon Mobil*, and this Court's analysis herein. In *Mothershed,* the plaintiff sued the justices of the Arizona and Oklahoma Supreme Courts and sought injunctive relief from the judgments of the Arizona and Oklahoma state courts. He sought reinstatement. He thus sought "relief from the state court judgment," *Kougasian,* 359 F.3d at 1140, and to "overturn an injurious state-court judgment." *Exxon Mobil,* 544 U.S. at 292. To be sure, the plaintiff in

Mothershed also asserted damage claims against the other parties. However, those additional claims, although "inextricably intertwined" with the claim for relief against the Arizona and Oklahoma state courts, were not the basis for finding that the federal suit contained a forbidden de facto appeal. As the Ninth Circuit explained in *Noel,*

> [a] federal district court, dealing with a suit that is, in part, a forbidden de facto appeal must refuse to hear the forbidden appeal. As part of that refusal, it must also refuse to decide any issue raised in the suit that is 'inextricably intertwined' with an issue resolved by the state court in its judicial decision.

Noel, 341 F.3d at 1158. The fact that issues raised in federal court may be described as "inextricably intertwined" with issues already decided in state court was not the basis for finding a jurisdictional bar under *Rooker-Feldman. See Kougasian,* 359 F.3d at 1142-43. As *Kougasian* had made clear, the "inextricably intertwined" analysis does not come into play unless and until a jurisdictional bar is found under *Rooker-Feldman* – that analysis determines the scope, not the existence, of the *Rooker-Feldman* bar. *Id.* Because the equitable relief sought in *Kougasian* invoked *Rooker-Feldman*, the intertwining claims for damages was barred as well. In the instant case, no *Rooker-Feldman* bar obtains at all.

Accordingly, the Court concludes that *Rooker-Feldman* does not bar any of the claims against

Defendants. Because *Rooker-Feldman* does not apply, the Court has subject matter jurisdiction over Mr. Khanna's claims and must now turn to the other arguments raised by Defendants.

B. Eleventh Amendment Immunity and Judicial/ Quasi-Judicial Immunity

1. State Bar

Defendants argue first that all claims against the State Bar must be dismissed based on the Eleventh Amendment. In the absence of consent, a suit in federal court against a state or one of its agencies or departments is proscribed by the Eleventh Amendment. *See Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 100 (1984). The Ninth Circuit has held that the State Bar is an arm of the state; accordingly, it is entitled to Eleventh Amendment immunity. *See Hirsh v. Justices of the Supreme Court of the State of Cal.,* 67 F.3d 708, 715 (9th Cir. 1995) ("The Eleventh Amendment's grant of sovereign immunity bars monetary relief from state agencies such as California's Bar Association and Bar Court."); *see also Allegrino v. State Bar of Cal.,* Nos. C06-05490 MJJ, C07-00301 MJJ, 2007 U.S. Dist. LEXIS 40155, at *11 (N.D. Cal. May 14, 2007) (dismissing all claims against the State Bar based on Eleventh Amendment immunity).

Mr. Khanna contends that the State Bar is not an arm of the state, citing *Keller v. State Bar of California,* 496 U.S. 1 (1990). However, this argument was

rejected by Judge Jenkins in *Konig v. State Bar of California,* No. C 04-2210 MJJ, 2004 U.S. Dist. LEXIS 19498 (N.D. Cal. Sept. 16, 2004), for reasons this Court finds persuasive. In *Konig,* Judge Jenkins acknowledged that "there is considerable debate over what type of entity the State Bar is in the context of other constitutional and statutory claims," but noted that both the Ninth Circuit and other judges in this District "have held that the Eleventh Amendment applies to the State Bar." *Id.* at *7 (citing cases, including *Hirsh*). With respect to *Keller,* Judge Jenkins explained that "the case has no relevance in the context of Eleventh Amendment sovereign immunity. *Keller* is a First Amendment freedom of speech and association case. The case does not hold, or even suggest, that the State Bar is not entitled to immunity." *Id.* at *9-10. Whether First Amendment rights and restrictions which obtain in the context of, *e.g.,* unions under *Abood v. Detroit Board of Education,* 431 U.S. 209 (177), apply to the State Bar is a question entirely independent of whether the State Bar is an arm of the state for Eleventh Amendment purposes.

Accordingly, all claims against the State Bar are dismissed with prejudice.

2. State Bar Employees

a. Official Capacity

The Eleventh Amendment "bars a federal action for damages, or other retroactive relief, against a

state official acting in his or her official capacity." *Allegrino,* 2007 U.S. Dist. LEXIS 40155, at *11; *see also Hirsh,* 67 F.3d at 715 ("[The Eleventh Amendment] immunity extends to the individual defendants [*e.g.,* the Bar Court judges and prosecutors involved] acting in their official capacities."). Accordingly, the State Bar employees have Eleventh Amendment immunity from suit in their official capacities for monetary damages and other retroactive relief.

It is true that, for prospective relief, a state official acting in his or her official capacity may be sued despite the Eleventh Amendment. *See Allegrino,* 2007 U.S. Dist. LEXIS 40155, at *12. However, Defendants are correct that Mr. Khanna does not seek prospective relief. He seeks damages. The fact that in his complaint he also seeks a discovery-type order prohibiting the destruction of evidence does not change the fundamental nature of the relief he seeks in this action. *See, e.g.,* Compl. ¶¶ 93-94 (asking the Court to direct the State Bar "not to destroy logs of its incoming mail [and fax] registry from the period of August 11, 2003 to October 11, 2003").

Nor does the fact that Mr. Khanna sought provisional relief that the California Supreme Court "reinstate [him] as an active and honorable member of the State Bar of California till [sic] this case is decided" make this case one involving prospective relief. *Id.* ¶ 91. As noted above, this relief was specifically disavowed by Mr. Khanna at the hearing on the motion to dismiss. *See also* Opp'n at 7 (stating

that "plaintiff is NOT challenging California Supreme Court's order of disbarment before this Court").

Accordingly, all claims against the State Bar employees in their official capacity are dismissed with prejudice as barred by the Eleventh Amendment.

b. Individual Capacity

While the official capacity claims should be dismissed because of Eleventh Amendment immunity, the Eleventh Amendment does not bar Mr. Khanna's claims against the State Bar employees in their individual capacities. *See Allegrino,* 2007 U.S. Dist. LEXIS 40155, at *14. That does not mean, of course, that the individuals may be immune from suit for other reasons. Defendants contend that all of the State Bar employees have judicial or quasi-judicial immunity for all claims.

Judicial immunity provides absolute immunity to a judicial officer, in exercising the authority vested in him, because the judicial officer "[should] be free to act upon his own convictions, without apprehension of personal consequences to himself." *Stump v. Sparkman,* 435 U.S. 349, 355 (1978) (internal quotation marks omitted); *see also Forrester v. White,* 484 U.S. 219, 226-27 (1988) (summarizing the rationales for judicial immunity). "[J]udicial immunity is not overcome by allegations of bad faith or malice." *See Mireles v. Waco,* 502 U.S. 9, 11 (1991). In *Hirsh,* the Ninth Circuit concluded that State Bar Court judges and prosecutors had "quasi-judicial immunity from

monetary damages," although it stated that this was only to the extent that "they perform[ed] functions similar to judges and prosecutors in a setting like that of a court." *Hirsh,* 67 F.3d at 715.

i. Judge McElroy

In the instant case, Judge McElroy is entitled to judicial or quasi-judicial immunity for all claims against her. All of the acts with which she is charged were taken in her judicial capacity – *e.g.,* erasing a recording of part of the State Bar Court proceedings, crediting Mr. Randhawa's testimony, and denying Mr. Khanna the right to obtain counsel. *See Mireles,* 502 U.S. at 12-13 (explaining that whether a judge's act is a judicial one relates to the nature of the act, *i.e.,* whether it is a function normally performed by a judge; adding that "we look to the particular act's relation to a *general* function normally performed by a judge" and not the particular act itself) (emphasis added). Mr. Khanna's claims against Judge McElroy are, in essence, that she was doing all that she could to decide the case in a particular way – *i.e.,* against him – but the Ninth Circuit has held that even a "conspiracy between judge and prosecutor to predetermine the outcome of a judicial proceeding, while clearly improper, nevertheless does not pierce the immunity extended to judges and prosecutors." *Ashelman v. Pope,* 793 F.2d 1072, 1078 (9th Cir. 1986).

ii. Ms. Albertsen-Murray

As for Ms. Albertsen-Murray, the prosecutor, she should have quasi-judicial immunity but only for those acts in which she performed a prosecutorial function. Defendants' suggestion that *Hirsh* provides for an immunity different from the absolute prosecutorial immunity, *see* Reply at 5, is not well supported. The Supreme Court has explained that "courts sometimes have described the prosecutor's immunity as a form of 'quasi-judicial' immunity and referred to it as derivative of the immunity of judges." *Imbler v. Pachtman,* 424 U.S. 409, 420 (1976); *see also* Schwartz & Kirklin, Section 1983 Litigation § 9.05[B] (stating that "[a]bsolute prosecutorial immunity is justified only when the prosecutor acts in an advocacy role exercising quasi-judicial power"). Moreover, as noted above, in *Hirsh,* the Ninth Circuit concluded that State Bar Court prosecutors had "quasi-judicial immunity from monetary damages" only to the extent that "they perform[ed] functions similar to . . . prosecutors in a setting like that of a court." *Hirsh,* 67 F.3d at 715

In his opposition, Mr. Khanna identifies with specificity only two acts taken by Ms. Albertsen-Murray that were wrongful, *see* Opp'n at 9: (1) her suborning of perjury by the Randhawas, *see* Compl. ¶ 12, and (2) her conspiring with the investigator, Ms. Verstegen, "to destroy, spoliate and hide [an] exculpatory [letter] from the trial judge." *Id.* ¶ 71. Taking all allegations in the complaint as true and drawing all inferences from the complaint in Mr. Khanna's

favor, *see Doe v. United States*, 419 F.3d 1058, 1062 (9th Cir. 2005), the Court concludes that the alleged acts of suborning perjury and conspiring to destroy exculpatory evidence are not protected by absolute prosecutorial immunity. As the Third Circuit has acknowledged, "there may well be situations in which the allegations [of a complaint] establish that the solicitation or coercion of false statements from a witness occurred while the prosecutor was acting in an investigative capacity." *Rose v. Bartle*, 871 F.2d 331, 344-45 (3d Cir. 1989). In addition, a prosecutor's destruction of exculpatory evidence is not related to the prosecutorial function because, "'while deciding not to furnish the prosecution's evidence to the defense may be an act of advocacy, throwing the evidence away is not.'"[3] *Yarris v. County of Del.*, 465 F.3d 129, 136-37 (3d Cir. 2006) (quoting *Wilkinson v. Ellis*, 484 F. Supp. 1072, 1083 (E.D. Pa. 1980)).

iii. Ms. Verstegen

Finally, taking all allegations in the complaint as true and drawing all reasonable inferences therefrom in Mr. Khanna's favor, the Court concludes that Ms.

[3] To the extent Mr. Khanna alleges that the exculpatory letter (or at least its packaging) was simply withheld by Ms. Albertsen-Murray, that act is clearly protected. *See Imbler*, 424 U.S. at 431 n.34 (1976) (concluding that not only prosecutor's role in allegedly suborning perjury but also prosecutor's "deliberate withholding of exculpatory information" were shielded by absolute immunity).

Verstegen, the investigator, is not entitled to absolute immunity for the destruction of of [sic] the exculpatory evidence for the reasons stated above. *See* Schwartz & Kirklin, Section 1983 Litigation § 9.05[K] ("[U]nder the functional approach, the immunity to which the investigator is entitled should depend upon an assessment of whether the contested activities were quasi-prosecutorial as opposed to administrative or investigative. . . ."); *see also Briscoe v. LaHue,* 460 U.S. 325, 342 (1983) ("[O]ur cases clearly indicate that immunity analysis rests on functional categories, not on the status of the defendant.").

However, for Ms. Verstegen's alleged act of perjury, committed during the State Bar Court proceedings, she is entitled to immunity under the common law. *See Briscoe,* 460 U.S. at 345-46 (concluding that a police officer has a common law witness immunity from a § 1983 claim that he gave perjured testimony at a criminal trial).

iv. Summary

For the reasons stated above, all claims against Judge McElroy in her individual capacity are dismissed with prejudice. In addition, the claim against Ms. Verstegen (the investigator) in her individual capacity for an alleged act of perjury, committed during the State Bar Court proceedings, is also dismissed with prejudice. Ms. Albertsen-Murry [sic] and Ms. Verstegen are not entitled to judicial or quasi-judicial immunity with respect to the claims asserted against them in

their individual capacities for acts committed in their investigative functions.

C. Preclusion

Given the above analysis on Eleventh Amendment immunity, the only question remaining is whether the claims against Ms. Albertsen-Murray and Ms. Verstegen in their individual capacities are barred by res judicata or collateral estoppel.

To determine whether the State Bar Court recommendation, affirmed by the California Supreme Court, has any preclusive effect, the Court must look to California's law of preclusion. *See Gupta v. Thai Airways Int'l, Ltd.*, 487 F.3d 759, 765 (9th Cir. 2007) ("Whether a prior state court judgment precludes relitigation of an identical claim in federal court depends on the preclusion rules of the state."); *Sasson v. Sokoloff (In re Sasson)*, 424 F.3d 864, 872 n.4 (9th Cir. 2005) ("'In determining whether a party should be estopped from relitigating an issue decided in a prior state court action, the bankruptcy court must look to that state's law of collateral estoppel.'"); *see also* 28 U.S.C. § 1738.

Under California law,

> "[t]he doctrine of res judicata gives certain conclusive effect to a former judgment in subsequent litigation involving the same controversy. The doctrine has a double aspect. In its primary aspect, commonly known as claim preclusion, it operates as a

> bar to the maintenance of a second suit between the same parties on the same cause of action. In its secondary aspect, commonly known as collateral estoppel, [t]he prior judgment . . . operates in a second suit . . . based on a different cause of actions [sic] an estoppel or conclusive adjudication as to such issues in the second action as were actually litigated and determined in the first action. The prerequisite elements for applying the doctrine to either an entire cause of action or one or more issues are the same: (1) A claim or issue raised in the present action is identical to a claim or issue litigated in a prior proceeding; (2) the prior proceeding resulted in a final judgment on the merits; and (3) the party against whom the doctrine is being asserted was a party or in privity with a party to the prior proceeding."

People v. Barragan, 32 Cal. 4th 236, 252-53 (2004) (emphasis and internal quotation marks omitted); *see also Vandenberg v. Superior Court*, 21 Cal. 4th 815, 828 (1999) ("In its narrowest form, res judicata precludes parties or their privies from relitigating a cause of action [finally resolved in a prior proceeding]. But res judicata also includes a broader principle, commonly termed collateral estoppel, under which an issue necessarily decided in [prior] litigation [may be] conclusively determined as [against] the parties [thereto] or their privies . . . in a subsequent lawsuit on a different cause of action.").

The Court concludes that collateral estoppel bars the remaining claims against Ms. Albertsen-Murray and Ms. Verstegen in their individual capacities. *See Sasson,* 424 F.3d at 872 n.4 ("noting that, under California law, collateral estoppel applies if (1) the issue sought to be precluded from relitigation is identical to that decided in a former proceeding; (2) this issue was actually litigated in the former proceeding; (3) this issue was necessarily decided in the former proceeding; (4) the decision in the former proceeding was final and on the merits; and (5) the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding").

First, the issues in the state proceeding and in the instant care [sic] are identical – *i.e.,* whether Ms. Albertsen-Murray suborned perjury and conspired with Ms. Verstegen to destroy exculpatory evidence. Notably, in his petition to the California Supreme Court from the State Bar Court decision, Mr. Khanna explicitly argued that Ms. Albertsen-Murray "knew both [the Randhawas] were committing and had committed perjury" and that "[s]he not only helped but rather encouraged them to do so." Def.'s RJN, Ex. H at 35 (petition to California Supreme Court). Likewise, he argued that exculpatory evidence had "intentionally [been] suppressed" by Ms. Albertsen-Murray and Mr. [sic] Verstegen. *Id.* at 31 (petition to California Supreme Court).

Second, the issues were actually litigated and necessarily decided in the state proceeding. *See*

People v. Carter, 36 Cal. 4th 1215, 1240 (2005) ("An issue is actually litigated [w]hen [it] is properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined. . . .") (emphasis and internal quotation marks omitted); *Bostick v. Flex Equipment Co., Inc.*, 147 Cal. App. 4th 80, 96 (2007) ("The necessarily decided requirement means only that the resolution of the issue cannot have been entirely unnecessary to the judgment in the initial proceeding.") (internal quotation marks omitted). The issues were raised by Mr. Khanna in his petition to the California Supreme Court and submitted for determination, and the issues were decided – and necessarily decided – by the Supreme Court because it ordered that he be disbarred. Although the Supreme Court did not provide a detailed ruling, it is an unavoidable inference that Mr. Khanna's disbarment was based on the finding that he had misappropriated funds from his clients – *i.e.*, there was no investment in AFL. By finding that there was no investment in AFL, the California Supreme Court necessarily accepted the Randhawas' testimony and therefore necessarily rejected Mr. Khanna's argument that Ms. Albertsen-Murray had suborned perjury. Furthermore, by implicitly finding that there was no investment in AFL, the Supreme Court necessarily accepted Ms. Verstegen's testimony that she never got a response from AFL and therefore necessarily rejected Mr. Khanna's argument that Ms. Verstegen had perjured herself and conspired to destroy exculpatory evidence with Ms. Albertsen-Murray.

Third, the California Supreme Court's decision was final and on the merits. The ruling of the California Supreme Court disbarring Mr. Khanna even though summary, is on the merits. *See Rose,* 22 Cal. 4th at 446-48 (indicating that the California Supreme Court's summary denial of a petition for review of a State Bar Court disciplinary recommendation amounts to a judicial determination on the merits); *see also Sandoval v. Superior Court,* 140 Cal. App. 3d 932, 936 (1983) ("The rules of res judicata are applicable only when a final judgment is rendered. However, for purposes of issue preclusion (as distinguished from merger and bar), final judgment includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect.") (emphasis and internal quotation marks omitted). No appeal was taken to the United States Supreme Court.

Finally, there need not be privity between the individual defendants and the State Bar in order for the individual defendants to assert collateral estoppel against Mr. Khanna. *See Younger v. Jensen,* 26 Cal. 3d 397, 409 (1980) ("[L]ike this court the United States Supreme Court has abandoned the mutuality requirement."). Privity is only a concern with respect to the party *against* whom preclusion is sought. *See Sassen,* 424 F.3d at 872 n.4 (stating that one of the elements of collateral estoppel is that "the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding"). There is no question here that Mr. Khanna,

the party against whom preclusion is sought, was a party in the prior state proceeding.

Mr. Khanna argues still that his claims cannot be precluded because of new evidence that he has which demonstrates that AFL does exist. The new evidence consists of a complaint filed by AFL against the Randhawas in an Indian Criminal Court, *see* Compl. ¶ 13, and a letter to the Randhawas, written by AFL's counsel in India, notifying them that a civil suit against them was about to be filed. *See id.* ¶ 16. Supporting documents for the criminal complaint include photocopies of a certificate of incorporation for AFL and a share certificate issued by AFL to Mr. Randhawa. The Court concludes that this new evidence does not prevent application of collateral estoppel.

First, Mr. Khanna has failed to demonstrate that the most compelling of his new evidence – in particular, the certificate of incorporation and the share certificate – is actually new evidence or evidence previously unavailable to him. *See Roos v. Red,* 130 Cal. App. 4th 870, 888 (2005) (rejecting challenge to collateral estoppel based on claim of new evidence because defendant's claimed new evidence was available to the defendant prior to the first proceeding). With reasonable diligence, Mr. Khanna should have been able to obtain AFL's certificate of incorporation and the share certificate in time for the State Bar Court proceedings since it is uncontested that his brother is the managing director of AFL. Moreover, it is notable that Mr. Khanna was able to get some

support from his brother in time for the State Bar Court proceeding as evidenced by the putative exculpatory letter that his brother wrote which was sent to Ms. Verstegen.

Second, even if the new evidence was not previously available, under California case law, collateral estoppel will still apply if the new evidence goes only to the weight of the evidence in support of the party who opposes preclusion. For example, in *Roos v. Red,* 130 Cal. App. 4th 870 (2005), a wrongful death suit, the defendant argued that it was unfair to apply collateral estoppel to a bankruptcy court's finding that he had willfully and maliciously caused an accident which killed two people because "he had an 'important new witness' who did not testify in the bankruptcy proceedings." *Id.* at 887. According to the defendant, "after the bankruptcy proceeding[,] he was finally able to locate and depose the driver of the car he rear-ended in the intersection. He claims that if he called to testify, the other driver would provide evidence consistent with [his] theory of the case (*i.e.*, that [he] was unconscious and acted involuntarily)." *Id.* The state court rejected the defendant's argument of unfairness because

> the other driver's testimony goes to the weight of the evidence supporting [the defendant's] version of the case; it does not establish a previously undiscovered defense theory nor does it result in a change in the parties legal rights. "An exception to collateral estoppel cannot be grounded on the

> alleged discovery of more persuasive evidence. Otherwise there would be no end to litigation."

Id. at 888.

At the hearing, Mr. Khanna argued that *Roos* is distinguishable from his case because there the new evidence was testimonial in nature, whereas here the new evidence consists of documents. This is not a material difference. Moreover, in *Evans v. Celotex Corp.,* 194 Cal. App. 3d 741 (1987), the alleged new evidence was documentary in nature rather than testimonial, and yet the court still applied collateral estoppel. *Evans* was a wrongful death suit, in which the plaintiffs argued that collateral estoppel should not bar their action because there were new facts that had occurred since the judgment in the prior litigation (a personal injury suit brought by the deceased) – namely, a lung biopsy which would not have been performed while the deceased was alive. *See Evans,* 194 Cal. App. 3d at 747. According to the plaintiffs, "as a result of the better diagnostic evaluation following the autopsy, asbestosis could be proved as the proximate cause of [the deceased's] death," although the plaintiffs did not indicate what the biopsy showed and how it differed from the evidence at the personal injury trial. *Id.* The court acknowledged that "[r]es judicata or collateral estoppel 'was never intended to operate so as to prevent a re-examination of the same question between the same parties where, in the interval between the first and second actions, the facts have materially

changed or new facts have occurred which may have altered the legal rights or relations of the litigants.'" *Id.* at 748. But, the court stated, in the case before it, there were no new facts or issues that came to light after the prior litigation:

> The legal relationship of the deceased vis-a-vis Celotex had not changed and there were no new events or conditions which altered the respective rights of the parties or caused a different legal doctrine to be applied. Here, the additional test performed during the autopsy simply goes to the weight of the evidence against Celotex; *i.e.*, this evidence did not establish a previously undiscovered theory of liability nor did it denote a change in the parties' legal rights.

Id.

The situations in *Roos* and *Evans* are analogous to the situation here. In the instant case, the new evidence proffered by Mr. Khanna goes only to the weight of the evidence supporting his case – *i.e.*, whether or not AFL actually existed. It does not establish a previously undiscovered theory nor does it result in a change in the parties' legal rights. Therefore, the new evidence proffered by Mr. Khanna does not defeat collateral estoppel.

Accordingly, based on collateral estoppel, the Court finds that the remaining claims against Ms. Albertsen-Murray and Ms. Verstegen are precluded and these claims are dismissed with prejudice.

III. CONCLUSION

For the foregoing reasons, all claims raised by Mr. Khanna against all Defendants are dismissed with prejudice. The Clerk of the Court is directed to enter judgment in the case in favor of Defendants and close the file in this case.

IT IS SO ORDERED.

Dated: September 10, 2007

/s/ Edward M. Chen
EDWARD M. CHEN
United States Magistrate Judge

STATE BAR COURT

HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of **PADAM KUMAR KHANNA,** **Member No. 85229,** A Member of the State Bar.	**Case No.** **02-O-11383-PEM** **DECISION AND ORDER OF INVOLUNTARY INACTIVE ENROLLMENT** (Filed Oct. 21, 2004)

I. INTRODUCTION

This disciplinary case involves a seasoned attorney who had created a web of deceptions to seduce his unsophisticated clients to invest $31,000 in a sham corporation and who insists on these same fraudulent and contrived misrepresentations before this Court. His acts of moral turpitude and dishonesty shock the conscience of the legal profession, pose a danger to the public, and degrade the highest possible professional standards for attorneys.

Respondent **PADAM KUMAR KHANNA** is charged with multiple acts of misconduct in one client matter. The charged misconduct includes (1) failing to comply with certain prophylactic requirements regarding an adverse interest; (2) misappropriating client's investment funds; (3) failing to return client files; (4) failing to render an accounting; (5) misrepresenting to the State Bar regarding the disposition of

client funds; (6) misrepresenting to the State Bar about the client files; and (7) failing to cooperate in the State Bar investigation.

This Court finds, by clear and convincing evidence, that Respondent is culpable of all but one of the charged acts of misconduct. Based upon the egregious nature and extent of culpability, as well as the applicable aggravating circumstances, the Court recommends that Respondent be disbarred from the practice of law in California.

II. PERTINENT PROCEDURAL HISTORY

The Office of the Chief Trial Counsel of the State Bar of California (State Bar) initiated this proceeding by filing a seven-count Notice of Disciplinary Charges (NDC) on June 25, 2003. On August 4, 2003, Respondent filed a response to the NDC.

At the August 2, 2004 pretrial conference, the parties stipulated to some of the facts underlying the State Bar's charges. These agreed upon facts were memorialized in a Stipulation As to Facts on August 17, 2004.

A three-day trial was held August 17-19, 2004. The State Bar was represented in this proceeding by Deputy Trial Counsel Tammy Albertsen-Murray. Respondent represented himself.

At the close of the hearing, the parties agreed to submit closing trial briefs on September 1, 2004. The Court took this proceeding under submission on

September 7, 2004, after the parties had filed closing trial briefs.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Jurisdiction

Respondent was admitted to the practice of law in California on May 15, 1979, and has been a member of the State Bar of California at all times since that date.

B. Findings of Fact

The following findings of fact are based on the parties' partial stipulation of facts and the evidence and testimony introduced at this proceeding. Other than Respondent, the witnesses who testified at trial were Jagjit Sing [sic] Randhawa, Baljit Randhawa, attorney Bryant H. Byrnes, and State Bar investigator Alice Verstegen. The Court finds Respondent's testimony to be self-serving and not credible. However, the Court finds the other witnesses to be credible.

1. Representation of Baljit Randhawa

Jagjit Sing [sic] Randhawa and Baljit Randhawa are Indian immigrants who speak very limited English. Jagjit has been a gas station attendant in Oakland since 1989 and had a second job at a car rental company in Berkeley until 2000. His wife, Baljit, has

worked at a fast food restaurant for the past six years.

While working at the car rental company, Jagjit met Respondent, who was a frequent customer there and speaks Jagjit's native language, Punjabi. Jagjit considered Respondent to be a friend because of their common culture and language.

Between 1996 and 1999, the Randhawas hired Respondent to represent them in several legal matters.

In 1996, Respondent provided legal services on behalf of and advice to Baljit in three matters: (1) Vehicle Code violations; (2) Temporary Restraining Order (TRO); and (3) shoplifting. There was no fee agreement.

The Randhawas testified that they paid Respondent the fees he had charged. Jagjit paid Respondent $1,000 for the Vehicle Code violations case and $500 for the shoplifting matter. He did not ask for a receipt. Respondent discussed the TRO matter with Baljit but did not charge any legal fees.

Therefore, the Randhawas did not owe Respondent any legal fees in those three matters.

a. Respondent's Contentions

Respondent denies that he had ever received any compensation for his services in the Vehicle Code violations case or the TRO matter. Respondent testified

that although he did not represent Baljit on the TRO matter, he did discuss the matter with her and had expected to be paid. But Respondent did not have a written fee agreement with the Randhawas and never asked for any fees.

Respondent further claims in a July 13, 2001, letter to the Randhawas' subsequent counsel, attorney Bryant H. Byrnes,[1] that the Randhawas owed him an additional $4,500 for his representation in the shoplifting matter. But Baljit did not plead guilty to shoplifting and was let off on a fine of $100. Moreover, Respondent testified he did not have a copy of any written fee agreement and that he does not remember whether he charged a flat fee.

Thus, Respondent's contention that the Randhawas still owe him legal fees in Baljit's three matters is without merit.

2. Representation of Jagjit Randhawa

Respondent represented Jagjit in two legal matters.

In or about 1996, Respondent represented Jagjit in one DUI case. Respondent charged him $2,500 which Jagjit paid. Again, there was no written fee agreement.

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[1] State Bar exhibit 9, p. 9.

In 1997, Jagjit hired Respondent to retrieve some of his personal property from a friend's house. Jagjit paid Respondent $700 to handle the case, as charged by Respondent. The Randhawas paid Respondent in full.

a. Respondent's Contentions

Respondent claims that he charged Jagjit $3,000 for the DUI matter and that he received only $500. As a result, Respondent argues that Jagjit still owes him the balance of $2,500.

Respondent also contends that he charged the Randhawas $3,500 for the personal property case but received only $500. Respondent admits that while he thinks he gave Baljita [sic] a fee agreement in this matter, he does not have a copy even though it is his policy to keep a copy of his fee agreements.

Respondent's contention that the Randhawas still owe him legal fees in Jagjit's two matters is rejected.

3. The Randhawas' Investment in Amerindia Foods Limited

Amerindia Foods Limited (AFL) is a food company incorporated in 1992 that is supposedly located in India. AFL's primary business purpose was to manufacture mango juice and manage a large tomato farm in India. According to Respondent, he was one of AFL's principal founders. Other founders included his

family and relatives. Respondent was AFL's President of the North American branch and legal counsel in the United States. Respondent's brother, Chiter S. Khanna, was AFL's chairman. In 1996, when his brother had a heart attack, Respondent was sometimes referred to as the chairman of AFL. Respondent testified that between 1995 and 2003, the company tried to acquire machinery but was unsuccessful.

In June 1995, Respondent opened a checking account at Bank of America in the name of Khanna Foods, USA, account number 05559-07175 (Khanna Foods account). According to Respondent, Khanna Foods, USA was not a company – it was his own business name. Respondent admitted that he was the sole proprietor of Khanna Foods, USA. He set up the account to receive royalty payments from AFL for technology that he and his mother had developed with respect to hybrid tomato seeds and to pay any incidental expenses that Respondent as legal counsel for AFL incurred in the United States.

In 1996, while representing the Randhawas, Respondent frequently discussed with Jagjit about AFL, its lucrative potentials, and the window period that the Randhawas could also partake in this business venture. Respondent enticed the Randhawas to invest in AFL. After viewing the company brochure and placing their trust on Respondent as a friend and attorney, the Randhawas became convinced of AFL's profitability and hurriedly gave Respondent $25,000 for investment in AFL within the deadline before Respondent left for India in November 1996. In

return, the Randhawas were to receive certain shares of stock in AFL.

Respondent provided the Randhawas with deposit slips to his personal bank account and Khanna Foods account. Respondent instructed them that each deposit should be less than $10,000 to avoid the scrutiny of tax officials. The deposit made in Respondent's personal bank account was for investment and not for payment of legal fees.

In accordance with Respondent's instructions, the Randhawas invested $25,000 in AFL by making three deposits in Respondent's bank accounts at Bank of America as follows:

Date of Deposit	*Amount*	*Account No.*
11/18/96	$ 9,000	05557-07176 (Respondent's personal account)
11/18/96	$ 9,000	05559-07175 (Khanna Foods account)
11/19/96	$ 7,000	05559-07175 (Khanna Foods account)
Total	*$25,000*	

Respondent then left for India. On November 25, 1996, Respondent issued a check made payable to himself from the Khanna Foods account in the amount of $4,000 for his Indian trip. (State Bar exhibit 6, p. 47.)

While Respondent was in India, he called the Randhawas to tell them that they would have to pay

an additional $5,000 to $6,000 in cash in order to have an investment of ten lakhs[2] of Indian Rupees. When Respondent returned from India, the Randhawas paid Respondent the additional $6,000 in cash as requested. They had borrowed the money from Jagjit's father.

Between December 1996 and September 1997, AFL sent three letters to Jagjit, confirming the receipt of his investment funds and promising the imminent issuance of stock certificates worth 20 lakhs shares.[3]

Despite Respondent's and AFL's repeated promises and Jagjit's constant inquiries regarding AFL stock, to date, the Randhawas have not received a single stock certificate or any evidence of their investment.

Contrary to Respondent's assertion that he set up the Khanna Foods account to receive royalty payments from AFL and to pay any incidental expenses that Respondent as legal counsel for AFL incurred, Respondent used the account to pay Respondent's personal bills and purchases. In December 1996, he paid $1,827 for a computer, $1,028.38 for another computer and $200 with a notation "Happy Holiday," and $100 to Household Credit

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[2] A lakh is a unit in Indian currency.

[3] State Bar exhibit 28, pp. 3, 4 and 6.

Services, Inc. In January 1997, he paid $330.97 to PacBell and $20 for a parking citation.

In 2001, after it became clear to the Randhawas that they were never going to receive a single stock certificate or any evidence of their investment, the Randhawas hired attorney Bryant H. Byrnes to assist them in recovering and/or obtaining an accounting of their investment funds. On June 29, 2001, Attorney Byrnes wrote to Respondent, asking for an accounting of the investment funds and legal fees that the Randhawas had paid.[4]

On July 13, 2001, Respondent listed the Randhawas matters and stated that he had received $2,100 in legal fees from the clients but that they still owed him about $19,000.[5] However, he did not provide an accounting of the fees or the investment funds. Respondent further wrote:

> "Since June 1999, when I disassociated from Mr. Randhawa, he has repeatedly threatened and harassed me about his claimed investment in the Indian project. I have repeatedly told him to please show the receipts of the money which he claims he sent to India or deposited in my account for payment of fees."

In other word, Respondent was denying he had ever received the investment funds from the Randhawas

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[4] State Bar exhibit 9, pp. 8-12.

[5] State Bar exhibit 9, p. 8.

unless they had proof. Meanwhile, the $16,000 in the Khanna Foods account was depleted by 2001.

On July 18, 2001, attorney Byrnes again wrote to Respondent requesting that Respondent allow him an opportunity to see six Randhawas client files.[6] On August 7, 2001, Respondent replied that these were closed files, he would have to locate them, and due to the press of business he would not be able to do anything about the files until the end of August. On September 18, 2001, attorney Brynes again requested that Respondent make available to him the Randhawas' files.[7] On September 21, 2001, Respondent replied:

> "I am extremely busy till the 15th of October, 2001. However, I can certainly send the copies of all the files . . . which I have been able to locate. Those certainly belong to him and he has an absolute right to those files. I will charge you the going rate for copying and my time."[8]

Although Respondent replied, his answers were nonresponsive. Respondent did not return the files or provide an accounting. In December 2001, attorney Byrnes assisted the Randhawas in filing a complaint with the State Bar. When the State Bar wrote to

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[6] State Bar exhibit 9, p. 13.

[7] State Bar exhibit 9, p. 15.

[8] State Bar exhibit 9, p. 17.

Respondent in January 2002 about the return of the client files, he replied:

> "[T]his is the first time I have been requested to do so. Neither the Randhawas nor their attorney Mr. Byrnes had asked for the files to be sent."[9]

In the April 2002 response, Respondent wrote: "I did not know who to send the files to." Respondent finally returned the files to attorney Byrnes in April 2002.

a. Respondent's Contentions

Respondent denies that he had ever given the bank deposit slips to the Randhawas or instructed them to make such deposits. He argues that those bank deposit slips must have been stolen from his office because he had no idea how the Randhawas obtained access to those deposit slips.

In a January 30, 2002 letter[10] to State Bar Complaint Analyst, Rebecca Foley, Respondent wrote:

> "The Randhawas never paid me $25,000 for a business investment. As Randhawas were my clients, they were strictly prohibited to invest money in any of my personal investments."

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[9] State Bar exhibit 11.

[10] State Bar exhibit 11.

Respondent stated that on November 18, 1996, Jagjit called him after he deposited $9,000 in Respondent's personal bank account as partial payment for his legal fees and $9,000 in the Khanna Foods account and threatened that he was going to deposit another $16,000 into the Khanna Foods account in the next few days. Respondent recalled being very upset that Jagjit deposited $9,000 for investment in the Khanna Foods account. He also blamed the Randhawas for being "out of control and uncooperative during their status as [his] clients." He "opted to withdraw as their counsel but stayed on when they pleaded total ruin because of language and cultural barriers." He contended that the Randhawas still owed him more than $19,000 in legal fees.

He further alleged in his January 2002 letter that once he sent the money to AFL, it was AFL's responsibility to return the $16,000 to the Randhawas and that he had "nothing to do with [Jagjit's] investment."[11] He also wrote: "Because of not being able to exercise any control over Randhawas I closed both account sometimes in 1999."[12]

Respondent claimed that he told Jagjit that investing in AFL was absolutely forbidden and that

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[11] In Respondent's January 30, 2002 letter to the State Bar, Respondent stated, "Since 1999, Mr. Randhawa has been enquiring about his investment in AFL. I have repeatedly told him that I have nothing to do with his investment and that he should contact AFL directly." (State Bar exhibit 11.)

[12] State Bar exhibit 11.

on November 18, 1996, he sent Jagjit a letter to that effect.[13] In the November letter, Respondent warned Jagjit that he could not invest in any of Respondent's personal projects such the AFL. He admonished Jagjit not to invest any money in AFL. He also told Jagjit that he was sending Jagjit's investment funds to India and would advise AFL not to allow Jagjit to invest and to return the money. But the Randhawas testified that they never saw that letter.

In an April 11, 2002 follow-up letter to the State Bar,[14] Respondent purported to be intrigued by Jagjit's knowledge of his personal and AFL accounts at Bank of America. He also claimed that since Jagjit, on his own initiative, deposited the funds for investment, his fiduciary duty as the attorney for AFL was to forward the money to AFL (which was their notice of the investment) and request that AFL then return the money to the Randhawas.

At trial, Respondent testified that when he learned that the Randhawas had deposited $16,000 into his Khanna Foods account, he asked his mother in India, who was a shareholder in royalties to AFL, to give $16,000 to AFL. Respondent reckoned that once his mother transferred $16,000 to AFL, the $16,000 in his Khanna Foods accounts was then his personal money. He further testified that the $9,000

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[13] State Bar exhibit 28, p. 2.

[14] State Bar exhibit 13.

deposited in his personal account was for outstanding legal fees that the Randhawas still owed.

The Court finds Respondent's contentions absolutely unbelievable and unreasonable and rejects his fabricated stories. In particular, Respondent was at a loss to explain where his mother obtained the $16,000 to give to AFL in India. Respondent told the Randhawas to pursue the refund of their investment funds from AFL directly and not from him because he could not touch the funds in the Khanna Foods account. Yet, he considered the $16,000 in the account as his personal money.

More important, the Court does not believe that the entity of AFL even existed. Respondent has produced no independent reliable evidence, other than photocopies of uncertified documents and letters from alleged officers of the company.

Assuming that AFL was incorporated in 1992 and the Khanna Foods account was opened in 1995 for the purpose of AFL doing business in United States, between the years 1996 and 1999, other than the Randhawas' $16,000 deposit in November 1996 and a $100 deposit in February 1997, the account had no other deposits during those three years. The balance ranged between $22.41 in September 1996 and ($59.44) in January 1997, excluding the Randhawas' deposit.[15] By May 1999, the balance was zero.

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[15] State Bar exhibit 6.

Such a business account is clearly suspect. Respondent self-righteously claimed that he had to close the bank accounts because the clients were out of control when in fact, there were no other substantial transactions except for the $25,000 in November 1996.

Moreover, there is no evidence that the alleged letters from AFL were mailed from India. The December 21, 1996, letter[16] from the Director of Finance of AFL, informing the Randhawas that AFL received their investment of five Lakhs and 52,000 Rupees and that stocks and shares would be issued in January 1997, was personally delivered to the Randhawas by Respondent. Similarly, the September 19, 1997, letter,[17] informing the Randhawas that AFL was in the process of issuing the class A preferred stock certificate worth 20 lakhs shares to the Randhawas, was also personally delivered to the Randhawas by Respondent.

In February 2003, the State Bar investigator Alice Verstegen wrote letters to the alleged officers of AFL in India – Financial Controller, the Secretary-Corporate Affairs and the Vice-President of Human Resources – regarding the Randhawas' investment in AFL. She never received replies from these individuals.[18] Instead, the State Bar received a letter from Chiter S. Khanna, Respondent's brother and

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[16] State Bar exhibit 28, p. 3.

[17] State Bar exhibit 28, p. 6.

[18] State Bar exhibit 21.

purportedly the chairman of AFL, dated September 12, 2003.[19] The letter coincidentally corroborates Respondent's side of the story. But the suspicious letter was delivered to the State Bar in an envelope without any postage markings and Verstegen was never able to track down its origin of mailing. Respondent blamed the missing original envelope from India on the State Bar's destruction of evidence. Absent any evidence of tampering, the Court believes that Respondent somehow had the letter delivered to the State Bar and not necessarily from India.

Chiter Khanna's letter contradicted the other alleged letters from AFL. He wrote that AFL would immediately refund the money to the Randhawas as unsolicited funds for investment. In fact, he stated that "we have made every possible effort from 1997 to 1999 to refund the funds to Mr. Randhawa." While he indicated that the investment was prohibited and that its financial department made an error regarding the issuance of the stock, there is no evidence of the alleged October 18, 1997 follow-up letter correcting its error. He further claimed that AFL ceased operations in 1999 and was in the process of liquidation, some five years later. In sum, the letter conveniently supported Respondent's arguments without any credible evidence.

Finally, Respondent is supposedly the legal counsel for AFL, yet he could not produce any certified

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[19] State Bar exhibit 27.

copies of AFL's articles of incorporation. In fact, he could not produce any certified copies of documents proving AFL's legal existence. Respondent may have had originally intended AFL to be a legitimate business. Yet, it never got off the ground. AFL became a sham corporation, unbeknownst to the Randhawas. But Respondent knew. Nevertheless, Respondent maintains that the current status of AFL is good in 2004 even though AFL's chairman stated that they were in the process of liquidation in 2003.

C. Conclusions of Law

1. Count One: Avoiding Interests Adverse to a Client (Rules Prof. Conduct, Rule 3-300)[20]

Rule 3-300 provides that an attorney must not enter into a business transaction with a client or knowingly acquire an interest adverse to a client unless the transaction or acquisition is fair and reasonable to the client, is fully disclosed to the client, the client is advised in writing that the client may seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to do so, and the client thereafter consents in writing to the transaction or acquisition.

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[20] References to rules are to the current Rules of Professional Conduct.

The purpose of this rule is to "recognize the very high level of trust a client reposes in his attorney and to ensure that that trust is not misplaced. [Citations.] Sadly, this case stands with too many others as an example of an attorney's preference of his personal interests in manifest disregard of the interests of his client." (*In the Matter of Kittrell* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 615, 623.)

Respondent argues that he should not be responsible for a client's investment just because he "also happens to be a stockholder in that company." (Respondent's Closing Arguments, 17:21-24.) Such a cavalier attitude undermines the purpose of rule 3-300.

Respondent clearly failed to demonstrate that the dealings with the Randhawas were fair and reasonable. (*Hunniecutt v. State Bar* (1988) 44 Cal.3d 362, 372-373.)

Respondent clearly and convincingly violated rule 3-300 by failing to comply with its prophylactic requirements. Respondent knew that the terms of the business transaction were unfair and unreasonable to the Randhawas in that they did not receive any evidence of their investment, such as a stock certificate or promissory note. In fact, the Randhawas were never given any interest in AFL. Also, the Randhawas' investment was not secured. Further, the transaction and its terms were never fully disclosed and transmitted in writing to the Randhawas in a

manner that should reasonably have been understood by them. Moreover, the Randhawas were never advised in writing that they should seek the advice of an independent lawyer of their choice nor were they given a reasonable opportunity to seek the advice of an independent lawyer of their choice. Finally, Respondent did not obtain written consent from the Randhawas to the terms of the transaction. Thus, Respondent violated rule 3-300.

2. Count Two: Misappropriation (Bus. & Prof. Code, § 6106)

Business and Professions Code section 6106[22] provides that the member's commission of an act involving moral turpitude, dishonesty or corruption constitutes grounds for suspension or disbarment.

The State Bar charges that Respondent, after receiving the Randhawas' $25,000 investment funds, misappropriated those funds, thus committing acts of moral turpitude and dishonesty.

Respondent argues that he never asked the Randhawas to invest in AFL and that they invested in AFL against his specific instructions not to do so. He further professes not to have any idea of how the Randhawas got access to his deposit slips. He also alleges that the deposit slips were stolen from his

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[22] References to sections are to sections of the Business and Professions Code.

office while the Randhawas testified that he gave them specific depositing instructions. Once the Randhawas deposited the money into his personal account and the Khanna Foods account, Respondent then claims that the $9,000 in his personal account was for legals [sic] fees that the Randhawas still owed him despite the fact that there were no outstanding fees. He asserts that the $16,000 in the Khanna Foods account belonged to AFL and was nonrefundable to his clients. He further tells a convoluted story of how his mother gave another $16,000 to AFL so that the $16,000 remaining in the Khanna Foods account could be his personal money. As discussed earlier, the Court finds Respondent's story unbelievable and rejects each of his fabrications.

In fact, Respondent engaged in a scheme to defraud the Randhawas out of their money by luring them to invest in a nonexistent company and then spent their money on his personal expenses. The promised stock certificates never materialized. Therefore, by misappropriating $31,000 advanced by the Randhawas, Respondent committed acts amoral turpitude and dishonesty in wilful violation of section 6106.

3. Count Three: Failure to Return Client Files (Rules Prof. Conduct, Rule 3-700(D)(1))

Respondent is charged with a violation of rule 3-700(D)(1), which provides that a member whose employment has terminated must promptly release

all papers and property to the client at the request of the client.

Respondent contends that in January 2002 he had not sent the files to attorney Byrnes because he did not know who to send the files to and was not sure if attorney Byrnes still represented the Randhawas.[23] In his April 2002 letter to the State Bar, Respondent indicated that he still did not know to whom to send the Randhawa files.[24] At trial he blamed attorney Byrnes for not calling him to confirm whether attorney Byrnes wanted to view the files and for not sending him a letter of authorization from the Randhawas. In other word, Respondent argues that he was in a fog as to what to do with the files.

Contrary to Respondent's assertion, attorney Byrnes' repeated requests for the client files in July and September 2001 constitute a sufficiently specific request under rule 3-700(D)(1). Respondent clearly was aware of the obligation because he replied to those letters, albeit nonresponsive, and admitted that Jagjit "has an absolute right to those files." After October 2001, when Respondent failed to make the files available or send them to attorney Byrnes in a timely manner, attorney Byrnes assisted the Randhawas in filing a complaint with the State Bar.

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[23] State Bar exhibit 11.

[24] State Bar exhibit 13, p. 2.

Finally, some ten months after the request, Respondent wrote to the State Bar and attorney Byrnes on April 25, 2002,[25] that he was going to send the files to attorney Byrnes. In attorney Byrnes' May 9, 2002 letter to the State Bar,[26] attorney Byrnes confirmed that he had received the Randhawa files from Respondent. Respondent's failure to comply with attorney Byrnes' July 18, 2001 request for the Randhawas files until late April 2002 is clear and convincing evidence that Respondent is culpable of violating rule 3-700(D)(1). Respondent's defense of misunderstanding is not justified.

4. Count Four: Failure to Render Accounts (Rule 4-100(B)(3))

Respondent is charged with a violation of rule 4-100(B)(3), which provides that a member must maintain complete records of all funds, securities and properties of a client coming into the possession of the member or law firm and render appropriate accounts to the client regarding them.

The Court finds, by clear and convincing evidence, that Respondent is culpable of violating rule 4-100(B)(3). In response to attorney Byrnes' request for an accounting of the investment funds and legal fees, Respondent's July 13, 2001 letter did not contain a

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[25] State Bar exhibits 14 and 15.

[26] State Bar exhibit 16.

breakdown of the legal fees that he had been paid. Instead, he simply listed the alleged total amount of legal fees received from his clients and the total amount of outstanding fees in each matter. Moreover, Respondent attempted to deny that the Randhawas had ever made an investment in AFL. In fact, in that letter, Respondent demanded that the Randhawas show him the receipts of money they had sent to India for investment in AFL.

The Supreme Court noted the duty of an attorney to keep proper accounting books and client transactions records so that the attorney could produce them and show fair dealing if the attorney's actions were called into question. "The failure to keep proper books is in itself a suspicious circumstance." (*Clark v. State Bar* (1952) 39 Cal.2d 161, 174.)

To date, the Randhawas have not received an accounting of the $31,000 they had invested in AFL or their legal fees. Respondent's failure to render an accounting of the monies received from the Randhawas constitutes a wilful failure to render an appropriate account of client funds within the meaning of rule 4-100(B)(3). (See *In the Matter of Fonte* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752, 758.)

5. Count Five: Misrepresentations to the State Bar Regarding Client Funds (Bus. & Prof Code, § 6106)

The State Bar charges that Respondent violated section 6106 by misrepresenting to and misleading

the State Bar regarding the disposition of the funds the Randhawas had given him in his letters to the State Bar on January 30 and April 11, 2002.

In the January letter, Respondent stated that he "only had authority from AFL to use [the Khanna Foods] account for payment of AFL incurred usual incidental expenses in the United States." In the April letter, Respondent again claimed that the account "was strictly for expenses and other related expenses incurred by [Respondent] as [AFL's] legal representative in the United States." In fact, Respondent used the account to pay Respondent's personal bills and purchases, such as computers and a parking citation.

Respondent also denied that he was responsible for the Randhawas' investment in AFL. He wrote in the April letter to the State Bar, "Mr. Randhawas [sic] deposited the funds for investment purposes and on his own initiative and volition. I never told him to do so."[27] Respondent further argued that the Randhawas had deposited the funds in Respondent's bank accounts without being authorized to do so. "[T]hey were strictly prohibited to invest money in any of my personal investments."[28] He claimed that he had no knowledge of how the Randhawas knew about his accounts when in fact, he gave them the deposit slips and instructed them to deposit installments of less

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[27] State Bar exhibit 13.

[28] State Bar exhibit 11.

than $10,000 each time. He told the State Bar that he would advise AFL not to allow the Randhawas to invest and to return the money. But AFL supposedly acknowledged receipt of the funds, thanked the clients, and assured them the stock certificates were forthcoming.

Finally, he asserted that he had nothing to do with the investment funds and that the clients had to seek a refund from AFL directly. He feigned how upset he was upon finding out about the investment. Yet, he treated the $16,000 as his own personal funds and the $9,000 as payment for legal fees.

Therefore, Respondent clearly committed acts of moral turpitude by making these false, contradictory and misleading statements regarding the client funds to the State Bar in wilful violation of section 6106.

6. Count Six: Misrepresentations to the State Bar Regarding Client Files (Bus. & Prof Code, § 6106)

Respondent is charged with violating section 6106 by making numerous misrepresentations and misleading statements to the State Bar regarding the Randhawas' files. In his January 2002 letter to the State Bar, Respondent claimed that it was the "first time" he had heard the clients demanded their files. In fact, attorney Byrnes had been requesting them since July 2001. Respondent also asserted that he had offered attorney Byrnes "to see them at the time suitable to both of them." On the contrary, he told

attorney Byrnes that he could send the copies of all the files and that he would charge him the going rate for copying and Respondent's time for copying. He also claimed that he told attorney Byrnes that he could see the files anytime after October 15, 2001 but that he had not heard from attorney Byrnes.

Arguably, because Respondent wrote "can certainly send" and not "will certainly send," it was not definite that Respondent was going to forward the files to attorney Byrnes. At the same time, he never directly told attorney Byrnes that the files were available for his review after October 15, 2001. After waiting five months without any success, attorney Byrnes reasonably decided that rather than wasting time in a battle with Respondent to retrieve the files, he and his clients would seek the State Bar's assistance. Even that took an additional five months since Respondent continued to deny his unwillingness to release the files to his clients and blamed attorney Byrnes for the inexcusable miscommunication. In his April 25, 2002 letter to the State Bar, Respondent insisted that "[a]t no point in time anyone asked [him] to either *forward* or *send* the files to Mr. Byrnes."[29]

The Court finds his contentions groundless. He had clearly and convincingly violated section 6106 by misrepresenting to and misleading the State Bar that he had offered attorney Byrnes an opportunity to

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[29] State Bar exhibit 14.

review the client files but attorney Byrnes had chosen to ignore the opportunity. In fact, it was Respondent who did not promptly release the files as requested.

7. Count 7: Failure to Cooperate With the State Bar (Section 6068(i))

Section 6068(i) provides that an attorney must cooperate and participate in any disciplinary investigation or proceeding pending against the attorney.

The State Bar alleges that Respondent failed to cooperate in a disciplinary investigation by making false and misleading statements to the State Bar.

Because Respondent responded to the State Bar's letters, albeit untruthful, he did not substantively violate the statute requiring him to cooperate with the State Bar's investigation of his misconduct. His misrepresentations to the State Bar have already been found in violation of section 6106. Therefore, Respondent did not violate section 6068(i).

IV. LEVEL OF DISCIPLINE

A. Factors in Mitigation

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for

Atty. Sanctions for Prof. Misconduct, std. 1.2(e).)[30] There is no compelling mitigating evidence.

Although Respondent has no record of prior discipline in his 17 years of practice when the misconduct began in 1996, his lack of record is not considered as mitigation because his present misconduct is deemed very serious. (Std. 1.2(e)(i).)

The Court Offered Respondent adequate opportunity to introduce mitigating factors, but he declined. Although he listed at least 13 potential character witnesses and stated that more than 100 clients who were "ready, willing and able" to testify about his character, none testified on his behalf.

B. Factors in Aggravation

There are many aggravating factors in this case. (Std. 1.2(b).)

Respondent committed multiple acts of wrongdoing in abusing his position of trust for personal gain. (Std. 1.2(b)(ii).) He improperly solicited the Randhawas for investment, engaged in a scheme to defraud the clients, misappropriated about $31,000 from the Randhawas to his own use and benefit, failed to promptly return client files, failed to provide them with an accounting, and failed to avoid adverse interests.

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[30] All further references to standards are to this source.

Respondent's misconduct was clearly surrounded by bad faith, dishonesty and overreaching by misrepresenting to the clients that AFL was a profitable business venture and lured them to invest. They believed him because they considered him a friend, a fellow countryman who spoke their language. When Respondent telephoned them from India, they believed that the investment was sound and a profit would be made. Based on the trust and confidence that the Randhawas held for Respondent as their attorney and friend, they were willing to borrow money from Jagjit's father to satisfy Respondent's request for the final investment. But after they invested, he told them that he could not refund the monies because of his fiduciary duty owed to AFL and that they had to recover the funds from AFL directly. Then he converted the funds to his own use. At trial, Respondent attempted to slander the Randhawas' character, insisted that their investment was forbidden and denied ever persuading them to invest. He claimed the $16,000 became his own personal funds because his mother in India paid AFL the $16,000. (Std. 1.2(b)(iii).)

Furthermore, Respondent failed to provide any fee agreement to the Randhawas even though the fees exceeded $1,000. (Bus. & Prof. Code, § 6148.) This uncharged misconduct is considered as further aggravation. (Std. 1.2(b)(iii).)

Respondent's misappropriation of $31,000 caused the Randhawas substantial harm. (Std. 1.2(b)(iv).) The clients hold working class jobs with limited

financial means. Despite their many requests for a refund or an accounting of their investment, Respondent has not returned the money to the Randhawas.

Respondent demonstrated indifference toward rectification of or atonement for the consequences of his misconduct. (Std. 1.2(b)(v).) He refuses to admit to any wrongdoing, despite the clear and convincing evidence, and has never reimbursed any of the funds misappropriated from the clients. Instead, he insists that the Randhawas were to blame for their financial loss and that Respondent was the victim of the Randhawas' dishonesty.

Respondent displayed a lack of cooperation to the Randhawas. (Std. 1.2(b)(vi).) His lack of candor to the State Bar has already been found as a violation of section 6106. More significantly Respondent's misrepresentations at trial and in his closing brief are further aggravating. "Under certain circumstances, false testimony before the State Bar may constitute an even greater offense than misappropriation of clients' funds." (*Doyle v. State Bar* (1982) 32 Cal.3d 12, 23,) Here Respondent's testimony regarding the existence of AFL, his inability to refund the investment funds, the incredible letters and documents from alleged officers of AFL, the theft of the deposit slips, and so on, was deliberately false. His lack of candor is a strong aggravating circumstance.

V. DISCUSSION

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve public confidence in the profession and to maintain the highest possible professional standards for attorneys (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1025; Std. 1.3.)

This case involves misappropriation of about $31,000, fraud, failure to release client files, failure to render accounts, failure to avoid adverse interests, and repeated misrepresentations to the State Bar. The standards for Respondent's misconduct provide a broad range of sanctions ranging from reproval to disbarment, depending upon the gravity of the offenses and the harm to the client. (Stds. 1.6, 2.2(a), 2.3, 2.8, and 2.10.) The standards, however, are only guidelines and do not mandate the discipline to be imposed. (*In the Matter of Moriarty* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 245, 250-251.) "[E]ach case must be resolved on its own particular facts and not by application of rigid standards." *(Id.* at p. 251.)

Standard 2.2(a) provides that culpability of wilful misappropriation of entrusted funds shall result in disbarment, unless the amount is insignificantly small or the most compelling mitigating circumstances clearly predominate. Here, Respondent's misappropriation of about $31,000 is significant and there is no compelling mitigation.

Standard 2.3 provides that culpability of moral turpitude and intentional dishonesty toward a court or a client shall result in actual suspension or disbarment. As discussed above, Respondent's misappropriation was an act of moral turpitude and his incredible justification for his action to the Court is dishonest.

In his closing arguments,[31] Respondent maintains that he did no wrong. Instead, he charges that the State Bar and attorney Byrnes had filed a false and malicious complaint against him and withheld and fabricated evidence. Respondent attacks the integrity of the State Bar and attorney Byrnes and attempts to vilify his clients' credibility and character with tangent reasoning and unsubstantiated allegations (i.e. prosecutorial misconduct, evil plot, immigration fraud, terrorists connection, and violent behavior.) Respondent contends that it is the State Bar who "must be properly punished for subjecting Respondent to such rigorous pressure and hardship for the past three years. OCTC must be made to answer for fabricating and suppressing the evidence and for making its witnesses knowingly perjure themselves under the laws of the State of California." (Respondent's Closing Arguments, 18:1-6.)

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[31] Respondent's exhibit FFF attached to his Closing Arguments is not admitted into evidence as it was introduced after the trial.

The State Bar, on the other hand, urges a minimum of two years actual suspension for Respondent's misconduct of misappropriation and misrepresentations, particularly since Respondent took advantage of immigrants clients who had extremely limited financial means, a significant language barrier, and virtually no business and investment experience. The State Bar has cited several cases in support of its disciplinary recommendation, including *In the Matter of Kittrell* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 615, *Rose v. State Bar* (1989) 49 Cal.3d 646, *Beery v. State Bar* (1987) 43 Cal.3d 802, and *In the Matter of Peavey* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 483, and *In the Matter of Johnson* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 233.

The Court finds Respondent's arguments without merit and his misconduct significantly more outrageous than that of the attorneys in *Kittrell, Rose, Beery, Peavey* or *Johnson*. Moreover, Respondent presented no mitigating evidence even though he had been in practice for 25 years.

In *Kittrell,* the attorney, who had been in practice for 24 years, was actually suspended for three years for entering into a real estate transaction with an unsophisticated client who lost her life savings of $61,000 in the transaction. The attorney concealed material facts and known risks from his client about the investment. Instead, he told the client that it was a "can't lose" investment.

In the other cases cited by the State Bar, those attorneys were actually suspended for two years for persuading vulnerable clients to invest in failed businesses without disclosing significant risks and abused the trust placed in them by their clients.

Here, at the time Respondent seduced his clients to invest in a high risk business, Respondent knew or should have known that the business was a sham. The company was alleged to be incorporated in 1992; the Khanna Foods account was never adequately funded, other than with the Randhawas' money; the company was supposed to be liquidated in 2003, some 11 years later without ever having done any business; and at trial, Respondent testified that the current status of AFL was good and that "in a year or two might be very good." Respondent's misrepresentations continue.

To further aggravate his misconduct, he advances his fraudulent and contrived misrepresentations before this Court by maligning the character and integrity of his clients, attorney Byrnes and Deputy Trial Counsel Albertsen-Murray, by producing uncertified documents and alleged letters from AFL's officers, by asserting that the $25,000 is now his and by denying ever having received the additional $6,000 from the Randhawas.

Respondent's misconduct reflects a blatant disregard of professional responsibilities. He clearly has shown no insight into his wrongdoing. He had flagrantly breached his fiduciary duties to the

Randhawas and abused their trust as their attorney. When he told them that AFL was lucrative business venture and that he needed the funds before his trip to India, the Randhawas believed him. Respondent exploited the Randhawas' trust, lack of business experience and high hope for a profitable return of their investment. He has refused to accept responsibility for his misconduct and has done nothing to rectify the harm he has caused.

It is settled that an attorney-client relationship is of the highest fiduciary character and always requires utmost fidelity and fair dealing on the part of the attorney. (*Beery v. State Bar* (1987) 43 Cal.3d 802, 813.) The Supreme Court noted that "[t]he essence of a fiduciary or confidential relationship is that the parties do not deal on equal terms, because the person in whom trust and confidence is reposed and who accepts that trust and confidence is in a superior position to exert unique influence over the dependent party." (*Id.*)

The misappropriation of client funds is a grievous breach of an attorney's ethical responsibilities, violates basic notions of honesty and endangers public confidence in the legal profession. In all but the most exceptional cases, it requires the imposition of the harshest discipline – disbarment. (*Grim v. State Bar* (1991) 53 Cal.3d 21.) In *Kaplan v. State Bar* (1991) 52 Cal.3d 1067, the Supreme Court disbarred an attorney who intentionally misappropriated $29,000 from his law firm. In *In the Matter of Spaith, supra*, 3 Cal. State Bar Ct. Rptr. 511, the attorney was disbarred

for misappropriating $40,000 from a client's personal injury settlement funds and misled the client over a year as to the status of the money.

In a similar case, *In the Matter of Priamos* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 824, the attorney engaged in business transactions with a client and committed acts of moral turpitude by his seven year self-dealing with over $500,000 of investment funds he was asked by his client to handle, which included the attorney unilaterally paying himself nearly $450,000 in management and legal fees. The attorney's failure to demonstrate an appreciation of misconduct or learn from his extended period of overreaching of his vulnerable client was a significant aggravating factor to disbar him.

In this case, it has been almost eight years since the Randhawas gave Respondent $31,000 for investment. Respondent unilaterally declares $9,000 as payment for outstanding legal fees and $16,000 as his own funds and denies receipt of the remaining $6,000. He has no accounting to evidence any outstanding legal fees owed by the Randhawas; no banking statements to support the banking transactions among AFL, his mother and the Khanna Foods account; and no certified documents of AFL as a legitimate corporation or a viable business entity. Like the attorney in *Priamos,* Respondent has no insight into his misconduct.

Moral turpitude is defined as "an act of baseness, vileness or depravity in the private and social duties

which a man owes to his fellowmen, or to society in general, contrary to the accepted and customary rule of right and duty between man and man." (*In re Higbie* (1972) 6 Cal.3d 562, 569.) Respondent has clearly and wilfully committed multiple acts of moral turpitude.

In recommending discipline, the "paramount concern is protection of the public, the court and the integrity of the legal profession." (*Snyder v. State Bar* (1990) 49 Cal.3d 1302.) "It is clear that disbarment is not reserved just for attorneys with prior disciplinary records. [Citations.] A most significant factor . . . is respondent's complete lack of insight, recognition, or remorse for any of his wrongdoing. To the present time, he accepts no responsibility for what happened and only seeks to blame others." (*In the Matter of Wyshak* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 70, 83. An attorney's failure to accept responsibility for actions which are wrong or to understand that wrongfulness is considered an aggravating factor. (*Carter v. State Bar* (1988) 44 Cal.3d 1091, 1100-1101.)

In this matter, the aggravating circumstances are significant. Although the Court had encouraged Respondent to provide mitigating evidence, he produced none. Respondent's refusal to return funds to the Randhawas, significant client harm and continuous failure to comprehend basic adherence to fiduciary duties owed to clients warrant the highest level of public protection. Instead of recognizing his wrongdoing, Respondent went to great length during his

testimony to deny his misconduct and blamed his clients for giving him the money. He insists that he was the victim, not his clients.

While the Randhawas may have had personal problems in the past, those issues are irrelevant to Respondent's misappropriation of their $31,000 investment funds, failure to promptly return their files, failure to render an accounting, failure to advise his clients regarding an adverse interest, failure to provide the clients with a fee agreement for fees exceeding $1,000, and making repeated misrepresentations to the State Bar. In other words, the clients' problems do not justify Respondent's professional misconduct or preying upon their vulnerability as Indian immigrants.

Respondent's acts of dishonesty "manifest an abiding disregard of the fundamental rule of ethics – that of common honesty – without which the profession is worse than valueless in the place it holds in the administration of justice." (*Levin v. State Bar* (1989) 47 Cal.3d 1140, 1147.)

The Supreme Court has repeatedly noted "that deception of the State Bar may constitute an even more serious offense than the conduct being investigated." (*Franklin v. State Bar* (1986) 41 Cal.3d 700, 712.) In *Olguin v. State Bar* (1980) 28 Cal.3d 195, the Supreme Court increased the recommended attorney's discipline from 90 days to six months not only because of his dereliction of duty to his client resulting in the action being dismissed but, particularly,

also because of his deceptive conduct on at least two occasions – lying to a State Bar investigator about that client matter, fabricating documents for his defense, and continuing to assert their authenticity after learning of their bogus nature.

Here, Respondent's misrepresentations to the State Bar investigator and before this Court an more egregious than those of the attorney in *Olguin* and thus, merit a more severe degree of discipline in light of his other offenses. (See *Worth v. State Bar* (1978) 22 Cal.3d 707, [disbarment for an attorney who misappropriated client funds and presented false and fabricated testimony to the State Bar – misrepresentations which he continued to make before the Supreme Court].)

After considering his reprehensible misconduct compounded by his presentation of false and fabricated testimony and evidence, the Court concludes that an actual suspension of two or three years is inadequate to protect the public, to preserve public confidence in the profession and to maintain the highest possible professional standards for attorneys. The "public is therefore at great risk unless Respondent is required to successfully complete a reinstatement proceeding before again being allowed to practice law in this state," (*In the Matter of Priamos, supra*, 3 Cal. State Bar Ct. Rptr. 824, 830.)

Respondent "is not entitled to be recommended to the public as a person worthy of trust, and accordingly not entitled to continue to practice law." (*Resner*

v. State Bar (1960) 53 Cal.2d 605, 615.) Therefore, based on the severity of the offenses, the serious aggravating circumstances and the lack of mitigating factors, the Court recommends disbarment.

VI. RECOMMENDED DISCIPLINE

This Court recommends that Respondent **PADAM KUMAR KHANNA** be disbarred from the practice of law in the State of California and that his name be stricken from the rolls of attorneys in this State.

It is also recommended that the Supreme Court order Respondent to comply with rule 955, paragraphs (a) and (c), of the California Rules of Court, within 30 and 40 days, respectively, of the effective date of its order imposing discipline in this matter.

VII. COSTS

The Court recommends that costs be awarded to the State Bar pursuant to Business and Professions Code section 6086.10 and payable in accordance with Business and Professions Code section 6140.7.

VIII. ORDER OF INVOLUNTARY INACTIVE ENROLLMENT

It is ordered that Respondent be transferred to involuntary inactive enrollment status pursuant to Business and Professions Code section 6007(c)(4) and rule 220(c) of the Rules of Procedure of the State Bar.

The inactive enrollment shall become effective three calendar days after service of this order.

/s/ Pat McElroy
PAT McELROY
Judge of the State Bar Court

Dated: October 20, 2004

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PADAM KUMAR KHANNA, Plaintiff-Appellant, v. STATE BAR OF CALIFORNIA; et al., Defendants-Appellees.	No. 07-16692 D.C. No. CV-07-02587-EMC ORDER (Filed Mar. 18, 2009)

Before: GOODWIN, WALLACE, and RYMER Circuit Judges

The petition for panel rehearing is denied.

No further filings will be accepted in this closed case.

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

1. 42 U.S.C. § 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

2. The Fifth Amendment of the Constitution provides in relevant part:

"No person shall be . . . deprived of life, liberty, or property, without due process of law;"

3. The Sixth Amendment of the Constitution provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall

have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

4. The Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment of the Constitution provides:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United Sates; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. Section 1985(2)

(2) Obstructing justice; intimidating party, witness, or juror

If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

* * *

18 U.S.C. Section 1621. Perjury generally

Whoever –

(1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or

(2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true;

is guilty of perjury and shall, except as otherwise expressly provided by law, be fined under this title or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

[SEAL]

In the Court of Hon'ble District Judge, Delhi.

In re: – Civil Suit No. [73/07 09/05/02] of 2007
(Ordinary Original Civil Jurisdiction).

In the matter of: –

M/s. Amerindia Foods Limited,
14-E/CC, Hari Nagar, New Delhi – 110064,
through its one of Director – Shri Kanwal
Sain Khanna . . . Plaintiff

Versus

1. Shri Jagjit Singh Randhawa
395, Sparrow Drive, Heroules,
California, United States of America

2. Mrs. Baljit Singh Randhawa
wife of Mr. Jagjit Singh Randhawa,
395, Sparrow Drive, Hercules,
California, United States of America

. . . Defendants.

Suit for recovery of Rs. 156,22,500/-(Rupees fifteen lacs twenty two thousands five hundred)

Court Fees paid: Rs.17,200/-(Rupees seventeen thousands two hundred).

Most Respectfully Showeth: –

[SEAL]

IN THE COURT OF SHRI LAL SINGH:
ADDL. DISTRICT JUDGE:
DELHI

Suit No. 73/07

Date of institution : 08.5.07

Date reserve for judgment : 18.8.08

Date of decision : 22.8.08

M/s Amerindia Foods Limited
14-E/CC, Hari Nagar, New Delhi – 64
through its Director/Authorised Representative
Sh. Kanwal Sain Khanna . . . Plaintiff

Versus

1 Sh. Jagjit Singh Randhawa
95, Sparrow Drive, Heroules,
California, United States of America

2 Mrs. Baljit Singh Randhawa
W/o Mr. Jagjit Singh Randhawa,
395, Sparrow Drive, Heroules,
California, United States of America

. . . Defendants

SUIT FOR RECOVERY OF RS. 15,22,500/-

Present: Sh. R.S. Mahla, Id. Counsel for plaintiff.

[SEAL]

JUDGMENT

The plaintiff brought the above suit for recovery of Rs. 15, 22, 500/- with averments that plaintiff is a

registered company incorporated on 30.10.92 under companies Act vide registration No. 01-14948 with Registrar of Companies, Andhra Pradesh, Hyderabad, India. The plaintiff company has one of its branch at 231, Jaina Towers, Vikas Puri, New Delhi- 110018. Sh. Kanwal Sain Khanna is one of the Directors of plaintiff company. He is competent to represent the plaintiff company and sign, verify the pleadings and proceed with the present suit vide resolution dated 4.11.2006, passed by Board of Directors of the plaintiff company. The plaintiff commenced its business w.e.f. 3.3.1994. Defendant No. 1 started business dealing with the plaintiff w.e.f. 20.11.1996. Defendant No. 1 is also registered share holder of plaintiff company, vide share certificate No. 8. The said share certificate was issue don 13.11.2003 on payment of Rs. 5 lakhs by the plaintiff on 30.12.1996. The receipt for the said amount was [SEAL] also issued. Defendant No. 2 is the wife of defendant No. 1 who claimed joint ownership in the sum of Rs. 5 lakhs. Defendant No. 1 and 2 purchased 50,000/- equity shares from plaintiff bearing face value of Rs. 10 each, vide share Ledger Folio No. 37, dated 13.11.2003, bearing distinctive No. 71 to 50070 against the payment of Rs. 5, 00, 000/-. This amount was paid by defendant No. 1 vide pay order No. 001108 dated 30th December 1996 issued by Union Bank of India, Nasik City. The plaintiff had acknowledged this amount vide letter dated 21.12.1996. Plaintiff also issued letter dated 7.7.1997 and 19.9.1997 informing defendant No. 1 about affairs of the plaintiff company. Sh. Padam Kumar Khanna was retained by plaintiff in the

plaintiff company in November 1995. He used to negotiate regarding purchase of food Processing Machinery from U. S. A. and Italy for installation of New Plant of plaintiff at Nasik. Sh. Padam Kumar Khanna personally approached Defendant No. 1 in U. S. A in 1996. Sh. Kanwal Sain Khanna Director of plaintiff also met Richhpal Singh Randhawa, brother in [SEAL] law of defendant No. 1 on 17.9.1996 at Hilton Hotel, New Delhi. Sh. Richhpal Singh Randhawa requested for help for his migration to U. S. A. Defendant No. 1 arranged a meeting in this regard between authorised representative/Director of plaintiff and Richhpal Singh Randhawa.. Sh. Padam Kumar Khanna was lawyer of defendant No. 1 in U. S. A. Sh. Richhpal Singh Randhawa brother in law of defendant No. 1 enquired for his investment in the plaintiff company and took form for investment in plaintiff's company at Nasik, India. On 18.11.1996 the plaintiff company was informed by Sh. Padam kumar Khanna that defendant No. 1 has deposited US $16000 in account of Khanna Foods without the knowledge of Padam Kumar Khanna. The Khanna Foods Account was stated to be in USA exclusively meant for dealing with plaintiff company. On coming to know about this fact, plaintiff has consulted its lawyer and RBI Consultants/Advisors. Plaintiff was advised that foreign Exchange Regulation Act 1973 (FERA) as amended strictly disapproved hard currency investments by foreigners in an Indian Public Limited Company such as [SEAL] AFL. Mr. Padam Kumar Khanna, was therefore, advised to remit/deposit the said investment of 16000 US $ to plaintiff's Bank Account No.

[Financial Account Number Omitted] at the Union Bank of India at Nasik City- [Financial Account Number Omitted], Maharashtra. Mr. Padam Kumar Khanna duly deposited this sum on 25.11.1996 in the account of plaintiff which was finally deposited in the books of plaintiff on 30.12.1996. The amount of US dollars 16000 was equivalent to Rs. 5, 52, 000/. The amount of Rs. 5 lakhs was duly deposited after deducting overseas transfer fees etc. in the account of Defendant No 1 in the books of plaintiff. As plaintiff was to follow the laws of land, therefore, plaitniff [sic] had advised Mr. Padam Kumar Khanna that after informing the Reserve Bank of India about this unsolicited and illegal investment, it will duly refund the money to Sh. Jagjit Singh Randhawa. Director Finance of plaintiff company Sh. Suresh Bhatia duly acknowledged the receipt of 16000 US $ amounting to Rs. 5, 52, 000/- on 21.12.1996. The letter was mailed to defendant No.1 by regular Airmail at California Address. Despite aforesaid dealings with correspondence, defendant has filed a false complaint against the plaintiff's [SEAL] representative Sh. Padam kumar Khanna with false allegations that he is not authorised representative and plaintiff company is not in existence. It was alleged that Mr. Padam Kumar Khanna has misrepresented a sum of Rs. 5 00.000/- (25000 US $), The said complaint was filed with State Bar of California, it was investigated by Alice Verstegen, Attorney, Special Investigator, Office of the Chief Trial Counsel, Enforcement 1149, South Hill Street, Los Angeles, California, U. S. A. Sh. Padam Kumar Khanna explained about the said

investment. However, State Bar of California imposed the penalty of US $ 31000 against Mr. Padam kumar Khanna and his licence was cancelled due to malicious prosecution by the defendant on false allegations, accusations and imputation. Mr. Padam Kumar Khanna has claimed damage/compensation for suffering, malacious prosecution, loss of his licence and livelihood, loss of reputation, status, dignity, creditibility [sic], losss [sic] of business etc. The defendants are liable for the sum at least to the extent of Rs. 25 lakhs. Thus, plaintiff has claimed a [SEAL] compensation/damage for Rs. 15 lakhs giving up remaining claim of Rs. 10 lakhs. The plaintiff is entitled for the same against the defendants on account of lowering down reputation, status, dignity, credibility, loss of business of the plaintiff. Plaintiff sent a legal notice of demand dated 15.2.07 calling defendant to pay Rs. 25 lakhs with interest @ 18 per cent per annum. This was duly served upon the defendants but the same has not been complied. The plaintiff is also claiming interest on the sum of Rs. 15 lakhs @ 18% per annum from 20.2.2007 to 30.3.2007 amounting to Rs. 22, 500/-. Thus, plaintiff has claimed a decree of recovery of Rs. 15,22, 500/- with pendentalite and future interest.

2. Defendant was proceeded exparte vide order dated 9.4.08 as defendant did not appear despite service of summons through Statesman newspaper, Foreign Eddition [sic] dated 15.3.08. Plaintiff was directed to lead exparte evidence. Plaintiff examined Sh. Kanwal Sain Khanna, Director and authorized representative of the plaintiff company as PW 1 who [SEAL] tendered

his affidavit Ex. PW 1/A in his evidence and deposed in his affidavit identically as per the averments in the plaint. During examination this witness proved documents, resolution dated 8.12.2006 Ex. PW 1/1, Registration Certificate of plaintiff company Ex. PW 1/2, Memorandum of Association and Articles of plaintiff company Ex. PW 1/3, certificate for commencement of business Ex. PW 1/4, share certificate Ex. PW 1/5, copy of letter dated 21.12.96 Ex. PW 1/6, Copy of letters dated 7.7.97 and 19.9.97 Ex. PW 1/7 and Ex. PW 1/8, copy of legal notice Ex. PW 1/9, postal receipt Ex. PW 1/10, plaint Ex. PW 1/11.

3. After tendering of the evidence by PW 1, evidence of plaintiff was closed.

4. I have heard Id. Counsel for plaintiff with patience and gone through the evidence adduced oral and documentary on behalf of plaintiff carefully. I have perused the certificate of incorporation and memorandum of Article [SEAL] Ex. PW 1/2 and Ex. PW 1/3 which establish that plaintiff company has been duly incorporated. PW1/4 is proving the commencement of business of plaintiff w.e.f. 30.12.92 PW 1/5 is the copy of resolution authorising Sh. Kanwal Sain Khanna Director to sign and verify the pleadings and institute the suit. I have also perused other documents on record Ex. PW 1/5 to Ex. PW 1/10. This suit for compensation has been instituted on the basis of false prosecution by defendant whereby Director of company Sh. Padam Kumar Khanna suffered the penalty, lost his licence and livelihood, lowering down

of reputation of the Director of the company. According the statement of PW 1 defendant has neither replied the notice of demand nor complied the same. Defendants have voluntarily chosen not to contest the suit. Therefore, in absence of any evidence in rebuttal, I do not have any reason to disbelieve the unrebutted testimony of PW 1 as company which is supposed to have a large business and prospects, the cummulative [sic] damage to the reputation and compensation of loss to the tune of Rs. 15 lakhs is not [SEAL] excessive. Therefore, it will be reasonable and justified if the same is allowed in favour of the plaintiff. However, when there is no agreement with respect to rate of interest, the interest as claimed cannot be allowed.

5. In view of above position of facts and circumstances of this case, the claim of plaintiff has been proved. The same is hereby decreed for the sum of Rs. 15 lakhs in favour of plaintiff against the defendant along with cost of the suit and simple interest @ 6% per annum from the date of suit till realisation.

Decree sheet be drawn. File be consigned to record room.

ANNOUNCED IN THE OPEN COURT
ON THIS 22ND DAY OF AUGUST, 2008

/s/ [Illegible]
(LAL SINGH)
ADDL.DISTRICT JUDGE
DLEHI.

[SEAL]

[Illegible]
Additional District Judge
Room No. 201 IInd Floor
The Hazari Courts, Delhi

[Ex-Parte] DECREE

IN THE COURT OF SHRI LAL SINGH: ADDL. DISTRICT JUDGE: DELHI

At suit No. 8773107

Claim for

Suit for Recovery
of
Rs. 15,22,500/=

Plaint presented on the 8.5.07

This suit coming on this day for final disposal before me in the presence of Sh R. S. Mahla, Ld. Counsel for the plaintiff and Defs. Ex parte for the Defendant; it is ordered that the suit of plaintiff is decreed with cost in favour of plaintiff against the defendant, [as per annexure attached].

	Rs.	P
Stamp for plaint	17200 = w	
Do. Of power	2 = w	
Do. Of exhibits	–	
Pleader's fee on Rs.	–	
Subsistence for witnesses	–	
Commissioner's fee	–	

Service of process	2116 = w	
Miscellaneous		
Totals	17448=w	

	Rs.	P
Stamp for power		
Do. For exhibits		
Pleader's fee on R.s.		
Subsistence for witnesses		[NIL]
Service of process		
Commissioner's fee		
Misc.		

Given under my hand the seal of the Court, this date of 22.8.08

[SEAL]

Additional District Judge
Room No. 201 IInd Floor
The Hazari Courts, Delhi

ANNEXURE

IN THE COURT OF SHRI LAL SINGH:
ADDL.DISTRICT JUDGE: DELHI

Suit No. 73/07

Date of institution : 08.5.07

Date reserve for judgment : 18.8.08

Date of decision : 22.8.08

M/s Amerindia Foods Limited
14-E/CC, Hari Nagar, New Delhi – 64
through its Director/Authorised Representative
Sh. Kanwal Sain Khanna . . . Plaintiff

Versus

1 Sh. Jagjit Singh Randhawa
395, Sparrow Drive, Heroules,
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2 Mrs. Baljit Singh Randhawa
W/o Mr. Jagjit Singh Randhawa,
395, Sparrow Drive, Heroules,
California, United States of America

. . . Defendants.

SUIT FOR RECOVERY OF RS. 15,22,500/-

Present: Sh. R.S. Mahla, Id. Counsel for plaintiff.

[SEAL]

the claim of plaintiff has been proved. The same is hereby decreed for the sum of Rs. 15 lakhs in favour of plaintiff against the defendant along with cost of the suit and simple interest @ 6 % per annum from the date of suit till realisation.

[SEAL]